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JUSTICE OF THE PEACE REPORTS

VOLUME 123

UNIV. OF MICH. JAN 20 1959 LAW LIBRARY

QUEEN'S BENCH DIVISION

(Lord Parker, C.J., Cassels and Streatfeild, JJ.)

October 14, 15, 1958

RANDS *v.* OLDROYD

Local Government—Borough councillor—Pecuniary interest—Disqualification for voting or taking part in discussion—Councillor managing director and substantial shareholder in building company—Tenders in the past for building council houses—No intention of tendering further—Discussion on council's policy with regard to tenders—Local Government Act, 1933 (23 & 24 *Geo.* 5, *c.* 51), *s.* 76 (1).

Section 76 (1) of the Local Government Act, 1933, provides: "If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority at which the contract or other matter is the subject of consideration, he shall at the meeting, as soon as is practicable after the commencement thereof, disclose the fact, and shall not take part in the consideration or discussion of, or vote on any question with respect to, the contract or other matter . . ."

The appellant, who was a borough councillor, was also managing director and a very substantial shareholder in a private building company. The company did not normally build council houses, although prior to 1954 they had done substantial building work for the borough council. In 1956 the appellant was appointed vice-chairman of the council's housing and town planning committee, and he then decided that in future the company should not tender for contracts with the council. The decision was, however, not recorded or notified to the council and could have been changed at any time. In July, 1957, it was proposed at a meeting of the borough council that, when it was required that tenders should be obtained in compliance with standing orders, the borough engineer should submit a tender, and, where necessary, the direct labour force of the council should be increased to implement that policy. At a later meeting an amendment was put forward to delete from the motion the words which enabled the borough engineer to increase the direct labour force. The appellant, despite some objections, spoke in favour of the amendment. The appellant was prosecuted at a magistrates' court for an offence under s. 76 (1). The magistrates were of opinion that he was sincere in a statement which he made to them that the company did not intend to tender for any further council work and that he had throughout acted openly and honourably, but held that, none the less, the offence was proved, and convicted him. On appeal by the appellant to the Divisional Court,

Held: that the mischief aimed at by the Act was to prevent members of local authorities who had occasion to enter into contracts from being exposed even to the semblance of temptation and to prevent a conflict of interest and duty which might otherwise arise; that the words "any other matter" in s. 76 (1) were not to be construed in a narrow sense; that in the present case the company did have a pecuniary interest in the matter under discussion; and that the interest was not too remote to bring them within the words of the section; and, therefore, that the appeal must be dismissed.

Brown v. *Director of Public Prosecutions* (1956), 120 J.P. 303, applied.

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CASE STATED by justices for the county of the Isle of Ely.

On Feb. 5, 1958, an information was preferred against the appellant, Leslie Harry Rands, by the respondent, Donald Oldroyd, alleging that the appellant, who was a member of Wisbech Borough Council, on Sept. 27, 1957, having an indirect pecuniary interest in the matter for consideration at a meeting of the council, took part, contrary to s. 76 of the Local Government Act, 1933, in a discussion of the said matter at a meeting of the borough council. The information was heard at Wisbech Magistrates' Court, and the justices found the following facts. The appellant was managing director of, and held two hundred of the three hundred ordinary issued shares in, Henry Rands & Son, Ltd. (referred to hereinafter as "the company"), a private company which carried on business as builders at Wisbech. In May, 1950, the appellant was elected to the Wisbech Borough Council (referred to hereinafter as "the council"), and he was also president of the Wisbech branch of the Federation of Building Trades Employers. The company did not normally build council houses, but after the last war they were encouraged by the council to tender for building contracts and through the appellant's efforts as president of the Federation bulk contracts were made with the council under which local builders, including the company, took part in building council houses. Since 1945 the company had taken part in nine such building contracts for which they were paid £114,299. No further tenders to the council were made by the company after August, 1954, and in 1956, when the appellant was appointed vice-chairman of the housing and town planning committee of the council, he decided, in view of his appointment, that the company would not tender in future for any building contracts for the council. This decision was not recorded nor were the council informed of it. The council's rules regarding contracts were set out in their standing orders, order 3 of which provided that no contract exceeding £500 should be made unless either public notice had been given in certain newspapers to enable people to tender, or invitations to tender had been sent to selected persons. In July, 1957, a motion was proposed at a meeting of the council that

> "Where it is required that tenders shall be obtained in compliance with standing order 3 . . . the borough engineer shall submit a tender on behalf of his department for any contract that he feels may be within the scope of that department, and, where necessary, the direct labour force be increased in order to implement this policy."

The motion was considered by the general purposes committee on Sept. 16, 1957, who reported that they did not consider it desirable to increase the direct labour force and, accordingly, when the motion was considered by the council on Sept. 27, 1957, it was suggested that it should be amended by, in effect, allowing the borough engineer to tender, as he had always done, but deleting from the motion the words which enabled him to increase the direct labour force and thereby to bring more work within the scope of his department. During the discussion of the proposed amendment by the council, when the appellant was speaking in favour of the amendment, objection was taken to his speaking by another councillor on the ground that the appellant had an interest in the matter which he should have declared; differing opinions were then expressed by other councillors on this point, but the appellant continued to speak in favour of the amendment, pointing out that it was undesirable for the council to take on extra labour and the difficulties arising when the particular work for which they had been taken on had ended. The company was at all times in a position to be invited to tender for building work for the council and to tender for such work in the future if they desired.

For the respondent it was contended that the motion before the council affected local builders because, if passed, it would increase competition from the borough engineer for tenders for building work; that the company had a direct pecuniary interest in the motion within s. 76 (2) of the Act of 1933, and that the appellant had an indirect pecuniary interest therein within s. 76 (1), since he was managing director and a shareholder of the company. For the appellant it was contended that s. 76 only applied where a member of a local authority had an existing pecuniary interest in the " contract or proposed contract or other matter " discussed and not merely an interest which might arise in the future; that an interest in an " other matter " within s. 76 (1) meant an interest in a specific transaction or matter whereas the matter discussed in the present case concerned general policy; that " interest " meant a legal or equitable right in the matter discussed; that, on the facts, the company had no direct interest in the motion discussed and, therefore, the appellant had no indirect interest in it and accordingly, no offence had been committed under s. 76. Both parties relied on *Brown* v. *Director of Public Prosecutions* (1).

The justices were of opinion that, although the appellant had acted sincerely and in an open and honourable manner throughout, nevertheless, as the company could have tendered for building work at any time, the appellant had committed an offence under s. 76. The justices granted the appellant an absolute discharge. The question stated for the opinion of the High Court was whether the justices came to a correct decision in law.

Wilson, Q.C., and *Kidner* for the appellant.

S. A. Morton for the respondent.

LORD PARKER, C.J.: Let me say at once that there is no question of any corruption or dishonesty in any sense of the word in this case. Indeed, the justices found that the appellant was sincere, that he had throughout acted openly and honourably, and, although they felt bound to convict him, they gave him an absolute discharge. Nevertheless the appellant appeals to this court saying that he was guilty of no offence and it may be that this is of interest not only to him but to councillors generally.

[HIS LORDSHIP then stated the facts as set out in the Case Stated and continued:] Section 76 of the Local Government Act, 1933, so far as it is relevant, is in these terms (sub-s. (1)):

> " If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority at which the contract or other matter is the subject of consideration, he shall at the meeting, as soon as practicable after the commencement thereof, disclose the fact, and shall not take part in the consideration or discussion of, or vote on any question with respect to, the contract or other matter."

Then there is a proviso which has not been relied on in this case, and I do not think that it is necessary to read it. Then by sub-s. (2) of s. 76 it is provided:

> " For the purposes of this section a person shall (subject as hereafter in this sub-section provided) be treated as having indirectly a pecuniary interest in a contract or other matter, if—(a) he or any nominee of his is a member of a company or other body with which the contract is made or is proposed to be made or which has a direct pecuniary interest in the other matter under consideration."

(1) 120 J.P. 303; [1956] 2 All E.R. 189; [1956] 2 Q.B. 369.

By sub-s. (6) of s. 76 failure to comply with the provisions of sub-s. (1) is made an offence.

It is clear, therefore, that the member of the council concerned, namely, the appellant, can only have an indirect pecuniary interest in this case if the company itself has a direct pecuniary interest. Therefore, one can limit the matter to this: Did Rands & Sons, Ltd., in the circumstances of this case have a direct pecuniary interest in any contract or proposed contract or other matter which was the subject of discussion at the meeting? There is no question here of any contract or proposed contract. If the company had a direct pecuniary interest it was because they had a direct pecuniary interest in an "other matter", and what is said is this, that the matter under discussion was a matter which, to put it generally, seriously affected the company in a pecuniary way in that if the original motion was carried the competition of the borough engineer might well be such as to prevent the company if they tendered from ever getting a contract. It is said that accordingly they had a financial interest and a direct financial interest in the matter to be discussed and which was discussed at that meeting.

The first matter, and I think the all-important matter here, is to consider the mischief aimed at by s. 76. One can say it is obvious, and indeed it is. It was put by LORD ESHER, M.R., in *Nutton* v. *Wilson* (1) ((1889), a case considering a rather similar provision in the Public Health Act, 1875, in these words:

> "I adhere to what I have before said with regard to provisions of this kind. They are intended to prevent the members of local boards, which may have occasion to enter into contracts, from being exposed to temptation, or even to the semblance of temptation."

LINDLEY, L.J., in the same case said:

> "To interpret words of this kind, which have no very definite meaning, and which perhaps were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise."

That is quite clearly the object of s. 76 of the Act of 1933, and whereas consideration of the mischief aimed at does not enable the court to construe the words in a wider sense than they appear, it at least means this, that the court would not be acute to cut down words otherwise wide merely because this was a penal statute. Counsel for the appellant in his very able argument has contended that nevertheless these words, "having a direct pecuniary interest in any contract or proposed contract or other matter", are not as wide, properly construed, as one would otherwise think. He relies in particular on the words "or other matter", and he says that whether one looks at the matter as a case of ejusdem generis or of noscitur a sociis, at any rate "other matter" must be something confined to what he would say was a specific transaction and not a matter of what might be said to be general policy. Apart from relying on that principle, he also points out that in the Municipal Corporations Act, 1882, which was repealed by the Act of 1933, the original corresponding section to s. 76 of the Act of 1933, s. 22 (3) of the Act of 1882, was in these terms:

> "A member of the council shall not vote or take part in the discussion of any matter before the council, or a committee, in which he has, directly or indirectly, by himself or by his partner, any pecuniary interest."

He points out that that is quite general; there is no reference there to a specific contract or proposed contract, and he invites the court to

(1) (1889), 53 J.P. 644; 22 Q.B.D. 744.

say that s. 76 was intended to be a limitation on what heretofore had been a very general provision. Speaking for myself, I find it impossible to give any satisfactory narrower meaning, even if I were so minded, to those words "any contract or proposed contract or other matter". I do not propose to go through the number of illustrations which have been canvassed in this court, but the more one does consider the matter the more difficult I think it is, even if one were so minded, to cut down those words "or other matter" to something which was definable and which was a limitation on what appear to be general words. Bearing in mind the mischief aimed at by this Act, I do not think those words are to be read in other than a very general way, and I see no ground for introducing a limitation which, as I said, is one which cannot satisfactorily be defined.

Counsel for the appellant also pointed out, quite rightly, that if one construes s. 76 in a very wide way, business at council meetings may be made impossible, it may stultify the whole proceedings, and that he invokes as another ground for cutting down the general meaning of those words. I quite appreciate that argument and the force of it, but I think that the limitation to be found in s. 76 is not in regard to those words "in any contract or proposed contract or other matter" but in the consideration whether the person under consideration—and here I am considering the company and not the appellant—had a direct pecuniary interest. I think the limitation is to be found in that word "direct" as opposed to a pecuniary interest which is too remote. In the present case I, for my part, am quite satisfied that the company did have a direct pecuniary interest and that that interest was not too remote to bring them within the words of the section. All these cases, of course, must be determined ultimately on their particular facts, but some help is to be gained, I think, by a consideration of the only one of two cases which have come before this court, namely, *Brown* v. *Director of Public Prosecutions* (1). The question debated there was as to lodgers' allowances to be paid by tenants of council houses, and three of the councillors who were on the council considering this matter were in fact tenants of council houses, albeit they had not any lodgers. The court also went on to consider and contrast the position of those councillors who had not yet got council houses, but might at some time apply for them. The court were clearly of opinion that those councillors who were already tenants, although they did not have lodgers as yet and might never have lodgers, did have a pecuniary interest in the contract. The court were clearly of opinion that they had a pecuniary interest in the contract, and they contrasted the position of those councillors who might become tenants of a council house in the future but who as yet had not become tenants. It is enough, I think, to refer to two passages in the judgment of LORD GODDARD, C.J., first where he said that Parliament had laid down that on any matter in which a member of a local authority had a pecuniary interest—and he undoubtedly had a pecuniary interest if he was paying rent for a house owned by the council—he should not vote at all. A little further on LORD GODDARD, C.J., refers to what might be thought to be anomalies; he says:

> "It is perfectly true to say that anomalies may occur, if they are really anomalies, though I do not think they are, e.g., councillors might vote on those matters knowing perhaps that in a fortnight's time or a month's time they themselves would be the occupiers of council houses and pay rent. One cannot deal with every point that arises, but if a person occupies a council house, I think he is debarred by the terms of the sub-section [sub-s. (1) of s. 76] from voting . . ."

(1) 120 J.P. 303; [1956] 2 All E.R. 189; [1956] 2 Q.B. 369.

Again, DONOVAN, J., in his judgment, after stating

> "The object of s. 76 (1) is clearly to prevent councillors from voting on a matter which may affect their own pockets and, therefore, may affect their judgment . . .",

goes on to say:

> ". . . I am referring to the others who had not taken in lodgers or sub-let. They each had a [council] house which was a potential income-producing asset, and their case is different from that of the councillor who merely had a hope of getting a house in future."

The facts there were quite different. As I have said, what was being considered was a contract of tenancy, but for my part I think that the relevance of it is that the limitation there suggested, namely, the limitation in the case of councillors who had not yet got tenancies, was that the court were making the very point which I am trying to make, namely, that one has to consider whether the pecuniary interest was direct or remote. They were really saying that the interest of councillors who had not a council house was too remote, whereas those that did have a council house came within the words of the section. For my part I think that in this case the company clearly had a direct pecuniary interest in the matter under discussion.

Finally, I should say this. The justices found not only that the company had not tendered since 1954, but also that the appellant himself had decided that in view of his holding the position which he held, namely, as vice-chairman of the housing and town planning committee of the council, his company would not tender in the future for any building contracts of the council. Further, the justices found in the last paragraph of the Case:

> "We were of the opinion that the appellant was sincere in his statement to us that his company did not intend to tender for any further council work."

For my part, I cannot think that that can affect the question whether an offence has been committed or has not been committed. It goes very clearly to mitigation but not to the offence, because at any time the appellant and the company could have changed their minds and tendered. It is a matter which the justices very properly took into consideration in passing sentence and, as I have said, they gave what I think is a very appropriate sentence in this case, namely, an absolute discharge. In my view, the justices, who dealt very ably with a difficult case, came to a correct decision, and I would dismiss this appeal.

CASSELS, J.: I agree. I do not propose to go into the facts of the case, but rather to deal with the matter generally. Parliament has, certainly since 1882, desired to deal with the case of any member of a council who votes or takes part in the discussion of any matter, before the council or committee, in which he has directly or indirectly by himself or his partner any pecuniary interest. That desire was continued under s. 76 of the Local Government Act, 1933, which provides:

> "If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority at which the contract or other matter is the subject of consideration . . ."

he must as early as he can disclose the fact, take no part in the consideration and discussion and record no vote on any question with respect to the contract

or other matter. There is no doubt that the mischief Parliament is aiming at is that members of a local authority should not be, if they have any pecuniary interest direct or indirect, taking such a part in the discussion or voting which might indicate to the public that they were not acting in the public interest but rather in their own private interest. It is no answer to say that the particular councillor had no pecuniary advantage to obtain by recording his vote. That particular phase of the matter was discussed by DONOVAN, J., in *Brown* v. *Director of Public Prosecutions* (1) when he said, referring to the circumstances of that case:

> " In those circumstances, no narrow construction ought to be put on the words 'pecuniary interest' in their context in s. 76 (1); in particular they ought not to be construed—and the contrary has not been suggested—as meaning pecuniary advantage."

The whole object seems to me to be that Parliament requires that members of a local authority, when there comes before that local authority a matter in which they have a peculiar interest which is pecuniary, shall restrain themselves and follow the requirements of s. 76, that is, disclose that fact and not take part in the discussion or vote on any resolution. One can well see that the confidence which the public has in local administration would be seriously jeopardised if it was thought that a councillor or a group of councillors put their heads together in order to get an advantage by reason of their pecuniary interest direct or indirect in the matter which was under discussion.

I am sure that the court has been very much obliged to counsel for the appellant for the well-phrased submissions which he has made to the court on this rather difficult question. Also I know that many illustrations can be put forward which perhaps are a little difficult at times to answer, but on the matters that have been mentioned in the course of this case I have no difficulty in arriving at the conclusion that the justices dealt with this matter most efficiently. They convicted, as they were entitled to do, on what was put before them and they mitigated by giving an absolute discharge. I also agree with what has been said by my Lord with regard to the appellant in this case. There is no suggestion against his honesty in the matter. He can return to Wisbech, if he should happen to be here, feeling that at any rate this matter has been well and thoroughly ventilated and that not a word could be breathed against him for the part which he took when this matter was before the council, but unfortunately he did have what can be rightly regarded as a pecuniary interest direct or indirect and he should have taken no part at all in the discussion. Councillors, if I may express a personal opinion, are better absent when these matters come before their local authority. I agree with the judgment of my Lord.

STREATFEILD, J.: I also agree, although I confess that I have been much impressed by the argument of counsel for the appellant as well as fully indorsing the decision of the justices referred to by my Lord that the appellant in the attitude which he took was acting perfectly openly and honourably. One is glad that that was reflected in the absolute discharge which the justices gave him though they felt obliged to record a conviction. But it is for this court to interpret the words of the legislature against the background of what is obviously the mischief aimed at.

Section 76 of the Local Government Act, 1933, is the successor of s. 22 of the Municipal Corporations Act, 1882, which was repealed by the Act of 1933. In s. 22 (3) of the Act of 1882 the words were as wide as could possibly be that

(1) 120 J.P. 303; [1956] 2 All E.R. 189; [1956] 2 Q.B. 369.

"A member of the council shall not vote or take part in the discussion of any matter before the council, or a committee, in which he has, directly or indirectly, by himself or by his partner, any pecuniary interest."

Those words are as wide as possible. The corresponding words in the repealing Act of 1933 are:

"If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter . . ."

It is argued that the insertion before the words "other matter" of "in any contract or proposed contract" cuts down and narrows in some way the meaning of the words "other matter". I cannot think that was the intention of Parliament and, as it seems to me, the words "other matter" have no less wide a meaning than they did under the Act of 1882. The test, therefore, is whether the councillor has directly or indirectly a pecuniary interest in the matter under consideration. It is to be implied under s. 76 (2) that he has such an indirect interest if he is a member of a company with which a contract is made or is proposed to be made or which has a direct pecuniary interest in the other matter under consideration. It seems to me that the sole question in this case is, whether the appellant's company had a direct pecuniary interest in the matter which was under discussion, viz., that in future the borough engineer should be empowered, indeed, as originally moved, should be obliged, to tender for any building contract in the future. Although the appellant's company, under his direction in 1956 when he became vice-chairman of the housing and town planning committee, had decided that in future they were not going to tender for any building contracts for the local authority, they had in fact done work until 1954. Although they had so decided that they would not tender in future, it was at all times open to that company as an existing building firm to reverse that policy and when a tender was advertised under the standing orders there was no reason why they should not make a tender in competition with others. In those circumstances, it seems to me that that company, so long as it was a building company and was in a position to tender, had a direct pecuniary interest in matters concerning building contracts by reason of this motion, which would have the effect of the borough engineer tendering in competition with other building contractors. In those circumstances, therefore, it does seem to me that the appellant, himself having indirectly a pecuniary interest in the company and that company having a direct pecuniary interest in the matter under discussion, came within the words of s. 76. For those reasons, in my view the interpretation which the justices put on this section was the correct one.

I would like to add a word or two with regard to *Brown* v. *Director of Public Prosecutions* (1), to which my Lord has referred. That case was concerned under s. 76 with certain councillors some of whom were actually tenants of the corporation and had lodgers and with three other councillors who were existing tenants of the corporation who had not got lodgers. It was held in that case that both lots of councillors had a pecuniary interest in the matter which was in that case under discussion. As DONOVAN, J., put it, even those tenants who had no lodgers nevertheless had a potential income-producing asset; in other words being holders of an actual contract they could at any time if they liked have taken a lodger and having that tenancy it was a potential income-producing asset. Both LORD GODDARD, C.J., and at any rate by inference DONOVAN, J., contrasted the position of such tenants with members of the council who were not yet tenants and indeed who might never become tenants. I cannot help thinking for myself that in so far as the phrases used by

(1) 120 J.P. 303; [1956] 2 All E.R. 189; [1956] 2 Q.B. 369.

LORD GODDARD, C.J., and DONOVAN, J., in that case dealt with councillors who were not yet tenants at all, they cannot be regarded as being obiter but were necessary for the decision of the case. Speaking for myself and without deciding it because the matter has not been fully argued, I would be inclined to think that councillors who were not yet tenants of council houses were in fact excepted by the proviso to s. 76 (1) because they were inhabitants. That matter was not argued and the court in *Brown* v. *Director of Public Prosecutions* (1) held that the proviso did not apply, not on that ground but on the ground that housing was not a public service within the meaning of the proviso, which of course it clearly was not.

In my view, the real key to this case may be found in the concluding words of DONOVAN, J., in referring to those councillors who had houses but no lodgers when he said:

> " . . . their case is different from that of the councillor who merely had a hope of getting a house in future."

In other words as inhabitants they might hereafter apply for a council house which might be or might not be granted; at any rate they would be entitled to ask for one. Here it was an existing building firm in the locality. It had in fact done work for the council until 1954. It was at all times in a position to tender for any building contracts or proposed contracts which might be invited, and in spite of the fact that their policy had been altered for the time being by the appellant it was at all times open to them to reverse that policy and tender in the future. For those reasons, therefore, I think that they had more than a hope of obtaining such a contract in the future; indeed, they had a positive right to tender for it when the tender was advertised. For those reasons, therefore, I do not think this case is governed in any way by *Brown* v. *Director of Public Prosecutions* (1) and in my judgment, after further thought, I have come to the conclusion that the justices were correct in their decision.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills*, for *Dawbarn, Barr & Knowles*, Wisbech; *Director of Public Prosecutions.*

T.R.F.B.

(1) 120 J.P. 303; [1956] 2 All E.R. 189; [1956] 2 Q.B. 369.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., STREATFEILD AND DIPLOCK, JJ.)

October 22, 1958

TONKIN *v.* RAVEN

Shops—Sunday closing—Multiple business—Regulations requiring exhibition of notices—Section of Act under which offence should be laid—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *s.* 47, *s.* 50, *s.* 53, *s.* 55, *s.* 57.

By s. 47 of the Shops Act, 1950: " Every shop shall, save as otherwise provided by [Part 4] of this Act, be closed for the serving of customers on Sunday ". By s. 50 of the Act and the Shops Regulations, 1937 (continued by the Act of 1950), where several trades or businesses are carried on in the same shop, and any of those trades or businesses consists only of certain transactions, the shop may be kept open on Sunday for the purposes of such transactions subject to certain conditions which include the display of notices.

The respondent, who was the occupier of a shop at which the retail trade or business of general stores was carried on, was charged at a magistrates' court with having failed to comply with the provisions contained in s. 50 of the Act and the regulations made thereunder, in that notices as required by s. 50 and the regulations were not displayed. The magistrates were of opinion that, if any offence had been committed, it should have been charged as an offence against s. 47 and not against s. 50, and they dismissed the information. On appeal by the prosecutor,

HELD: that s. 50 was a permissive enactment and did not create any offence, but was in the nature of an exemption from s. 47, which was the section creating the offence, and, therefore, the magistrates were right in dismissing the information on the ground that it had been wrongly laid.

Per STREATFEILD and DIPLOCK, JJ.: Apart from s. 47, separate offences are created by ss. 53, 55 and 57 of the Act.

CASE STATED by justices for the county borough of East Ham by the appellant Douglas George Tonkin, Chief Shops Act Inspector, on behalf of the county borough of East Ham.

On Mar. 25, 1958, an information was laid against the respondent, Bertie Raven, that on Sunday, Jan. 19, 1958, the respondent, being the occupier of a shop or place at which the retail trade or business of general stores was carried on, situated at 301, Church Road, E.12, within the district of the county borough of East Ham, failed to comply with the provisions contained in the Shops Act, 1950, s. 50, and regulations made thereunder, in that notices as required by s. 50 and the regulations were not displayed stating the purpose for which the shop was open, contrary to s. 50 and the regulations. The respondent did not appear. At the commencement of the proceedings at East Ham magistrates' court the court had intimated to the appellant, that, in the view of the justices, there appeared to be no offence known to the law disclosed in the summons, and accordingly the hearing was adjourned sine die to give the appellant an opportunity to seek instructions and advice in the matter. On the appellant's application the matter was restored to the list for hearing a fortnight later, and the summons was not amended. The respondent did not appear at the adjourned hearing which took place on May 20, 1958.

It was contended by the appellant that s. 50 of the Shops Act, 1950, created an offence; that, if a shopkeeper kept his shop open on a Sunday and that shop carried on several trades a notice in the prescribed form was not exhibited, and the shopkeeper was liable to be proceeded against for failing to display that notice under s. 50; and that the penalty for such an offence was to be found in s. 59 of the Act.

The justices were of opinion that (a) if an offence were to be alleged, it should be contravention of s. 47 of the Shops Act, 1950, which prohibited the opening

of a shop on a Sunday with certain exceptions; (b) s. 50 was created in order to allow occupiers of shops carrying on a mixed trade and opening on a Sunday to do so and was, therefore, an exempting section from prosecutions under s. 47, provided such a notice was exhibited; and (c) if such a notice was not exhibited in a shop carrying on a mixed trade and remaining open on a Sunday, then an offence was committed under s. 47. Accordingly, the justices dismissed the information, and the appellant now appealed.

Wrightson for the appellant.

The respondent did not appear.

LORD PARKER, C.J.: This is a Case stated by justices for the county borough of East Ham, before whom the respondent was charged with an offence against the Shops Act, 1950. The charge was in this form: that he being

> " the occupier of a shop or place at which the retail trade or business of general stores was carried on, situated at 301, Church Road, E.12, within the district of the council, did fail to comply with the provisions contained in s. 50 of the Shops Act, 1950, and regulations made thereunder in that notices as required by s. 50 of the Shops Act, 1950, and regulations made thereunder were not displayed stating the purpose for which the shop was open, contrary to the said provisions of the said Act."

This is a case where one has the greatest sympathy with magistrates. The respondent did not appear. There was no argument on his side, and they were faced with advice from their clerk that this charge disclosed no offence in law. They came to the conclusion that there was something in this and they adjourned the hearing in order that the present appellant, who was the Chief Shops Act Inspector, might consider the matter. The matter was argued and, in the end, the magistrates decided that the charge was wrongly laid and dismissed it. This is a highly technical point of course, but it may be none the less a good one, and it depends on the true construction of a few sections of the Shops Act, 1950.

Section 47 provides:

> " Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday . . ."

Then there is a proviso, but I do not think that, for the purposes of this case, I need go into the proviso and exactly what is meant by it. Section 50 provides something which is an exception to s. 47, and is in these terms:

> " Where several trades or businesses are carried on in the same shop and any of those trades or businesses consist only of transactions of such a nature that, if they were the only transactions carried on in the shop, the provisions of this Part of this Act requiring the shop to be closed for the serving of customers for the whole or any part of Sunday would not apply to the shop, the shop may be kept open for the whole or any part of Sunday, as the case may be, for the purposes of those transactions alone, subject, however, to such conditions as may be prescribed."

The type of transactions in question are set out in Sch. 5 to the Act; for certain transactions a shop is entitled to remain open. In the case of these multiple businesses, if the trade consists only of transactions which come within Sch. 5, the shop may be kept open for those transactions alone, subject to conditions prescribed, and conditions were prescribed under the preceding Shops (Sunday Trading Restriction) Act, 1936, and are to be found in the Shops Regulations, 1937 (S.R. & O. 1937 No. 271). They provide that, as a condition of remaining

open under s. 50, which was then s. 4 of the Act of 1936, two conditions should be fulfilled, (i) the exhibition of certain notices and (ii) that no goods should be exhibited other than goods for which the shop could lawfully be kept open. By the Act of 1950, those regulations continued and are the relevant regulations in this case. All that I need refer to finally is s. 59 (1), which provides for penalties:

> "In the case of any contravention of any of the foregoing provisions of this Part of this Act, the occupier of the shop shall be liable to a fine . . ."

A scale of fines is then set out.

The short point here is whether the charge in this case was properly laid as an offence against s. 50 of the Act and the regulations, and the magistrates took the view that it should have been laid under s. 47. Counsel for the appellant has taken us back to the Shops Act, 1912, where what is now equivalent to s. 50 of the Act of 1950 was made an express proviso to s. 4 (1) of the Act of 1912, which corresponds with the present s. 47, and s. 4 of the Act of 1912 by sub-s. (7) laid down the offence. In other words, under the original scheme of legislation in s. 4 of the Act of 1912, one found a self-contained code of general prohibitions, the exemptions to them and the penal provision. He argues that the scheme here is a different one. There may be offences against s. 47 and also against the following sections, in particular s. 50. The contravention of the subsequent sections, including s. 50, are themselves, he contends, separate offences, and he relies in particular on the wording in s. 59 (1) to which I have referred, "In the case of any contravention of any of the foregoing provisions of this Part of this Act . . ."

Paying all due regard to that, I find it is quite impossible to say that s. 50 creates any offence at all. If one reads it as I have done, it is clear that it is merely a permissive section subject to certain conditions, and I cannot see how a permissive section of itself can create an offence. There must be some proceeding which does create the offence to which the permissive section is an exemption, and, for my part, despite the present lay-out of the Act of 1950, I am constrained to feel that the position is exactly the same as it would have been under the Act of 1912. Counsel concedes that, under that Act, a charge would have to be preferred of an offence contrary to what was then s. 4 (1) and is now s. 47. I think that the magistrates properly applied their minds to this question and came to a correct decision in law, and I would dismiss this appeal.

STREATFEILD, J.: I agree. In my view, the starting-point for the construction of this Act is the words of s. 47 to the effect:

> "Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday . . ."

that is to say, there is a complete embargo on the opening of any shop on Sundays unless it is otherwise provided. There is a proviso to s. 47, where it is otherwise provided immediately, namely, that shops which come within Sch. 5 to the Act are exempt from this provision. One then passes to s. 50 which, as my Lord has pointed out, is a purely permissive section, and, on the question of construction, it is difficult to see how a permissive section is one which can create in itself an offence. To my mind, s. 50 means no more than this, that, in the case where several trades or businesses are carried on in the same shop and any one of those trades consists only of transactions and they were the only ones to which this Part of the Act would not apply, then the shop may obtain exemption provided it complies with the regulations. That, to my mind, simply

creates another exception to s. 47, which is the governing section creating the offence. It is quite true that the lay-out of this Act is different from the Shops Act, 1912, inasmuch as there is no penalty clause in s. 47. That is reserved for s. 59 (1) of the Act which lays down certain penalties "In the case of any contravention of any of the foregoing provisions of this Part of this Act . . ." Counsel for the appellant pointed out to us that there are no other sections to which that could apply unless s. 50 creates another offence as well as s. 47. Without the matter having been fully argued, I should be inclined to the view that s. 53, dealing with professors of the Jewish faith, might in itself create a separate offence against this Act, as it seems s. 57, dealing with notices, again might create a separate offence from s. 47; and I have since noticed s. 55, which clearly would create a different offence of delivering goods to customers on occasions when the shop would not otherwise be open for the service of customers. It seems to me that those are other instances of offences which are separate from s. 47, and which are all collected together so far as penalty is concerned under s. 59 of the Act.

I have come to the conclusion here that the real offence, if any, which was committed was the offence of remaining open on Sunday, contrary to s. 47, because, by reason of the failure to display the notices, in other words to observe the conditions laid down in the regulations under s. 50, the respondent has not brought himself within the exception visualised by s. 50. In my judgment, the justices were quite right in saying that the offence here, if any, was under s. 47 rather than under s. 50, and for those reasons I think this appeal should fail.

DIPLOCK, J.: For the reasons given by both of my brethren I agree. Section 47 of the Shops Act, 1950, is a difficult section, but, however difficult it may be, when regard is had not only to s. 50 but also to s. 48, s. 49 and s. 51, each of which provides that shops may be open in certain circumstances and are permissive, I think that s. 50 must be permissive. I also agree with my brother STREATFEILD, J., that there are other offences, such as s. 53 (1) (a), s. 55 and s. 57 which are covered by s. 59 of the Act.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *R. H. Buckley*, East Ham.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DONOVAN AND ASHWORTH, JJ.)

July 30, 1958

WOODWARD *v.* KOESSLER

Criminal Law—Prevention of crime—Carrying offensive weapon without lawful authority or excuse—Sheath knife—Attempt to break into building by means of knife—Use to intimidate caretaker—"Injury to the person"—Whether prisoner had with him offensive weapon—Prevention of Crime Act, 1953 (1 & 2 *Eliz.* 2, *c.* 14), *s.* 1 (1) (4).

By the Prevention of Crime Act, 1953, s. 1 (1): "Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence . . ." By sub-s. (4), "In this section . . . 'offensive weapon' means any article made or adapted for use of causing injury to the person, or intended by the person having it with him for such use by him."

"Causing injury to the person" in s. 1 (4) includes frightening or intimidating a person. To ascertain whether the prisoner "had with him", within the meaning of s. 1 (1), an article of the kind defined as an offensive weapon in s. 1 (4), regard should be had to the use which was in fact made of the article. It is not necessary to prove that the prisoner took the article out with him for the purpose of causing injury if, while he was out with it, he used it for that purpose.

CASE STATED by Reading borough justices.

An information was preferred at Reading Magistrates' Court by the appellant Woodward, a police officer, charging the respondent, Andrew John Koessler, that he, without lawful authority or reasonable excuse, had with him in a public place called Thorn Street an offensive weapon, namely, a sheath knife, contrary to s. 1 of the Prevention of Crime Act, 1953. The respondent and some other youths were trying to break into the Odeon Cinema, Reading with an iron bar and a sheath knife. When the elderly caretaker came to the door, the respondent, holding the knife, which was then out of its sheath, went up to him in a threatening attitude and said: "Can you see this?" The justices dismissed the information and the prosecutor appealed.

Durand, Q.C., and *Rountree* for the appellant.

A. J. D. McCowan for the respondent.

LORD GODDARD, C.J.: This a Case stated by justices for the county borough of Reading, before whom one Andrew John Koessler was charged that he without lawful authority or reasonable excuse had with him in a public place, called Thorn Street, an offensive weapon, namely, a sheath knife, contrary to s. 1 of the Prevention of Crime Act, 1953. Notwithstanding a well-sustained argument by counsel for the appellant the justices came, in my opinion, to a wrong decision for reasons which I will endeavour to give quite shortly.

The justices came to the conclusion that the accused was not carrying an offensive weapon. Their reason apparently was that the words of the definition are rather obscure. By s. 1 (4) of the Prevention of Crime Act, 1953:

> "'offensive weapon' means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him."

It could be said that the sheath knife was not made for the purpose of causing injury, though I do not know what other use these sheath knives or flick knives have; but assuming that it is like a razor, made primarily for the purpose of shaving and not for the purpose of causing injury, where I think that the justices

have gone wrong is in holding that, when the accused said that he did not intend to cause injury, that statement was conclusive. The justices have taken much too narrow a view of the words " causes injury ", because the accused obviously did intend to cause injury; frightening a person or intimidating a person is causing injury. If we were to hold that this young man with this shocking weapon was not in possession of an offensive weapon for causing injury, when he went up to an elderly man and said "Can you see this?", it would be driving a coach and four through this useful Act. It would hardly ever be possible to get a conviction. We know well why it is rather an obscure definition, viz., because one of the weapons that young hooligans like to use is a bicycle chain. The bicycle chain is not made for injury, but if a person is swinging a bicycle chain and saying " Look out ", that is using an offensive weapon.

In my opinion this appeal must be allowed and the Case Stated must go back to the justices with an intimation that the offence was proved and a reminder to the accused that there are such places as detention centres.

As this is the last case which we shall be trying in these sittings, I should like to say that we wish those who have the power of making rules could find some way of speeding up the stating of cases. This case was before the justices so long ago as Mar. 20. The offence was committed on Feb. 18, and it has been hanging over the accused until now. I am not thinking of him, but it would be much better that these cases should be disposed of quickly. The decision of the justices was given on Mar. 20, so that they had until June 20 in which to state a case, and, though I am not blaming anybody, I should think that this case could have been stated within a week of the hearing if anybody had sat down to it—then the case would have been heard last sittings.

DONOVAN, J.: I agree. Counsel for the accused founds himself on the words " having it with him ", and says that the accused must be found to have taken the weapon out with him with the intention of causing injury. Counsel says that in this case the accused took it for the purpose of breaking into the cinema. I do not agree with that narrow interpretation of the words " having it with him. " All that one has to do for the purpose of ascertaining what the intention is is to look and see what use was in fact made of it. If it is found that the accused did in fact make use of it for the purpose of causing injury he had it with him for that purpose. I think that the evidence shows that the accused in this case did have it with him for the purpose of causing injury. I may add that after he was taken into custody he handed the knife, unseen, to one of his companions, so that when he was searched it would not be found on him. One wonders why, if he knew it was not for causing injury, he threatened the caretaker with it saying—" Can you see this ? "

ASHWORTH, J.: I agree with both judgments which have been delivered.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *G. F. Darlow*, Reading; *Dennis Berry & Co.*, Reading.

T.R.F.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P. AND HEWSON, J.)

October 15, 1958

JONES *v.* JONES

Husband and Wife—Maintenance—Wilful neglect to maintain—No fault on part of husband—No knowledge of deterioration in wife's circumstances.

On Oct. 6, 1953, the wife obtained from a magistrates' court an order that the husband should pay her £2 17s. 6d. per week. This sum was punctually and regularly paid. In May, 1958, the wife complained to the same magistrates' court under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, alleging that the husband had been guilty of wilful neglect to provide reasonable maintenance for her. It was not proved that the husband knew, before the date of the complaint, that the sum of £2 17s. 6d. a week was no longer sufficient for her needs or of any change in her circumstances. On June 3, 1958, the magistrates' court found the wife's complaint proved on evidence that the wife was suffering hardship and that the husband could afford to pay, and they ordered the husband to pay the wife £2 a week.

HELD: the order of June 3, 1958, would be set aside since the husband, who had punctually paid under the order of Oct. 6, 1953, and was ignorant of any change in the wife's circumstances, could not be held guilty of "wilful neglect to provide reasonable maintenance for her", a phrase which implied an element of misconduct.

APPEAL by the husband against an order of Welshpool justices.

The husband was permanently disabled one hundred per cent. as a result of war service and was permanently confined to a hospital under the control of the Ministry of Pensions. The wife received assistance from the National Assistance Board under the National Assistance Act, 1948. On Oct. 6, 1953, on a complaint made under s. 43 of the Act of 1948, the justices made an order that the husband should pay to the wife the sum of £2 17s. 6d. This sum was regularly deducted from the pension payable to the husband by the Ministry of Pensions and paid punctually to the wife. On May 2, 1958, the wife complained to the justices that the husband had wilfully neglected to provide reasonable maintenance for her. The complaint was heard on June 3, 1958, when the justices found the complaint proved and made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, that the husband pay to the wife the sum of £2 a week. The husband appealed.

Perrett for the husband.
Stuckey (*G. H. Crispin* with him) for the wife.

LORD MERRIMAN, P., stated the facts and continued: It was suggested in the court below that the magistrates had no jurisdiction to make an order under the Summary Jurisdiction (Married Women) Act, 1895, because of the existence of the order of Oct. 6, 1953. I do not propose to dilate on this point, because it has been abandoned here before us. I merely say that there is authority in *Birmingham Union* v. *Timmins* (1) which decides that the existence of an order under the Act of 1895 did not prevent the guardians from getting an order under the Poor Law Amendment Act, 1868, s. 33, corresponding in some respects, but not in all, to the law laid down in the National Assistance Act, 1948. If the point had not been abandoned I should have wished to go into the converse position rather more carefully than we have been able to do on a cursory examination of *Birmingham Union* v. *Timmins* (1).

(1) (1918), 82 J.P. 279; [1918] 2 K.B. 189.

That brings me to the real point in the present case. It is suggested that the magistrates ought not to have found wilful neglect to maintain because of the punctual payment under the order made on Oct. 6, 1953. I think myself that that is not a good point, but I should have been happier about it if I felt that the magistrates had ever really given their attention to the issues which arise out of the circumstances that this order existed and had been punctually paid. They say in their reasons that they have come to the conclusion that wilful neglect to provide reasonable maintenance was proved because the evidence showed wilful neglect to provide reasonable maintenance and showed that the complainant was suffering extreme hardship; they said:

> "the evidence shows that though the husband is unfortunately completely disabled he is possessed of sufficient means to maintain the wife . . . [and] that the weight of the evidence shows that the husband being fully maintained in hospital without any expense to himself would not suffer any hardship in making the payments ordered."

I confess that those reasons look to me very much like saying that the wife needed the money, that the husband had got it, and that therefore there was wilful neglect to maintain; that there was wilful neglect to maintain because he had wilfully neglected to maintain her—a state of things about which we spoke rather plainly in *Starkie* v. *Starkie* (1). The real trouble in this case, in my opinion, is that that really represents what has happened, and the crucial point has not been considered.

On the authority of *Morton* v. *Morton* (2), which has been followed and approved in *Tulip* v. *Tulip* (3), dealing with the punctual payment of maintenance under an agreement not being conclusive against an allegation of wilful neglect to provide reasonable maintenance, I am prepared to assume that the same principle applies to the punctual payments under the order of Oct. 6, 1953, although there is, of course, an essential difference between payment under an order of the court and that which is merely payable under some agreement. I think, however, that the same problem still remains, whether the payment thus made is reasonable; and that leads me to what, I think, is the essential part of the evidence which is lacking in this case.

It is well settled that punctual payment under an agreement (and I think that the same thing applies to punctual payment under an order) is of very strong evidential value that the amount so agreed or so ordered is a reasonable amount, but it is not conclusive. Circumstances may have changed, and it is with regard to a case in which circumstances have changed that what was said by DENNING, L.J., in *National Assistance* v. *Parkes* (4) is so important. He says there:

> "The principle of *Tulip* v. *Tulip* (3) applies, I think, just as much when there is an agreement to pay nothing as when a fixed sum is to be paid, and it overrides anything said previously in *Baker* v. *Baker* (5) and *Chapman* v. *Chapman* (6)."

Pausing there, I ought to say that at this moment my brother and I have reserved a judgment [see *Lilley* v. *Lilley*, post] dealing with the validity of that pronouncement, about which, if I may quote myself and COLLINGWOOD, J., this

(1) 118 J.P. 17; [1953] 2 All E.R. 1255; 118 J.P. 59; [1953] 2 All E.R. 1519.
(2) 106 J.P. 139; [1942] 1 All E.R. 273.
(3) [1951] 2 All E.R. 91; [1951] P. 378.
(4) [1955] 3 All E.R. 1; [1955] 2 Q.B. 507.
(5) (1949), 66 (pt. 1) T.L.R. 81.
(6) (Apr. 4, 1951), unrep.

court has already said something in *Pinnick* v. *Pinnick* (1). We are not concerned here with that part of the case. What is important are the words that follow. DENNING, L.J., went on:

> " So long as the husband is ignorant of the new situation he is under no such duty [to maintain her], and is not guilty of wilful neglect to maintain her. That is, I think, the effect of the decision in *Stringer* v. *Stringer* (2)."

Stringer v. *Stringer* (2) is one of the cases in which the decision of the Court of Appeal in *Chapman* v. *Chapman* (3) was followed, and it happens to contain the explanation of how the unreported case of *Chapman* (3) came to be decided. It is perfectly correct to say it is a case in which the husband had had it brought to his notice that the circumstances had changed since the original situation. But we have looked in vain in the present case for any evidence whatever that at any time the financial plight of the wife, of which details were given to the magistrates, had ever in any way, directly or indirectly, been brought to the notice of the husband. After all, it was for the wife to prove her case of wilful neglect to provide reasonable maintenance. In the absence of proof of the important facts that her situation had changed for the worse, that the money which was being provided for her under the order of Oct. 6, 1953, was not sufficient to meet her needs, and that this was brought home to the knowledge of the husband, in my opinion, on the authority of the passage that I have just read, the wife fails. Likewise on the line of authorities *Starkie* v. *Starkie* (*No. 2*) (4), *Whittaker* v. *Whittaker* (5), *Diggins* v. *Diggins* (6), *Jones* v. *Jones* (7), and others, which have laid down that the element of misconduct is implicit in the words " wilful neglect to provide reasonable maintenance ", I think that the wife has failed to prove her case, from whichever point of view one looks at it.

One must recognise, as a matter of realism, that this cannot be the end of the story, but we are only concerned with the case as it stands. We have been asked to refer it back to the magistrates, but I do not think that in the circumstances that is the proper solution. I think that the wife set out to prove this case in a jurisdiction where she was entitled to prove it, and where it was practically impossible for the husband to attend to give evidence, and I think that, she having failed to prove her case, the order should be set aside, and I propose that that is what should be done.

HEWSON, J.: I agree with what the learned President has just said. Counsel for the wife said that since two officials had been investigating the matter on behalf of the wife and on behalf of various charitable organisations, it must be or might be inferred that the husband had been informed of his wife's condition, but I can see no substance in that argument at all. Both of those officials were in Welshpool and not in Cardiff, and were only the local representatives in Welshpool. There is not a shred of evidence that the husband in this case was ever informed of his wife's circumstances, or that the wife ever made them known to him. I entirely agree with the learned President that this order should be set aside. *Appeal allowed.*

Solicitors: *John T. Lewis & Woods*, for *Norman Morgan & Davies*, Cardiff; *Gregory, Rowcliffe & Co.*, for *Harrison & Sons*, Welshpool. G.F.L.B.

(1) 121 J.P. 256; [1957] 1 All E.R. 873.
(2) 116 J.P. 102; [1952] 1 All E.R. 373; [1952] P. 171.
(3) (Apr. 4, 1951), unrep.
(4) 118 J.P. 17; [1953] 2 All E.R. 1255; 118 J.P. 59; [1953] 2 All E.R. 1519.
(5) [1939] 3 All E.R. 833.
(6) 90 J.P. 208; [1927] P. 88.
(7) (1929), 94 J.P. 31.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND HEWSON, J.)

October 6, 7, 8, 9, 10, 29, 1958

LILLEY *v.* LILLEY

Husband and Wife—Maintenance—Wilful neglect to maintain—No matrimonial misconduct by husband—Wife suffering from neurosis and incapable of resuming cohabitation—Liability of husband.

The parties were married in 1948 and in 1952 a child was born. The birth of the child caused a gravely aggravated mental or nervous disorder in the wife which developed into an invincible repugnance to sexual intercourse with the husband. The parties separated, and on Oct. 12, 1954, a magistrates' court found the husband guilty of desertion and made a maintenance order in the wife's favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. Thereafter the husband wrote to the wife letters which were found to contain a genuine offer to resume cohabitation which the wife refused to accept, and on Aug. 23, 1957, the magistrates' court discharged the order. The husband continued to pay maintenance voluntarily for a short while, but then ceased to do so and the wife made a complaint to the same magistrates' court alleging that the husband had wilfully neglected to provide reasonable maintenance for her. The medical evidence was that the wife suffered from a neurosis which produced an acute revulsion from any physical contact with the husband and that if she returned to him there would be a serious breakdown in her health. The wife did not allege that the husband was guilty of any matrimonial misconduct, but contended that he was liable to maintain her at common law and that his deliberate refusal to do so amounted to wilful neglect.

HELD: the wife was not entitled to maintenance since her justification for refusing to cohabit with the husband involved no matter of complaint against him, and, therefore, there was no element of misconduct on his part to support a charge of wilful neglect to provide reasonable maintenance.

Pinnick v. *Pinnick* ([1957] 1 All E.R. 873) followed.

Per CURIAM: where a wife is not in desertion, and there is no question of adultery, the National Assistance Board has an independent right against the husband under s. 42 and s. 43 of the National Assistance Act, 1948, to recover from the husband contributions towards the cost of public assistance to the wife; an order under s. 43 (5) (b) for the husband to maintain his wife could be made by virtue of the express liability of the husband to maintain the wife under s. 42 and would not necessarily impute a finding of wilful neglect.

APPEAL by the wife against an order of the stipendiary magistrate for Kingston-upon-Hull whereby he dismissed her complaint that the husband had been guilty of wilful neglect to provide reasonable maintenance for her.

R. H. Hutchinson for the wife.

McHale for the husband.

Cur. adv. vult.

Oct. 29. **LORD MERRIMAN, P.,** read the following judgment: The order of Feb. 26, 1958, was on the third of three complaints between the spouses, all of which were heard by the learned magistrate. On Oct. 12, 1954, an order for £3 a week (viz., £2 for the wife and £1 for the child of whom she was given custody) had been made on her complaint of desertion. On Aug. 23, 1957, that order was discharged on the husband's complaint, but at the same time the learned magistrate made an order under the Guardianship of Infants Acts, giving the wife the custody of the child and ordering the husband to pay 30s. a week for the child's maintenance. Nevertheless, for a short time thereafter the husband continued to pay the total sum of £3. On Sept. 6, 1957, he ceased paying anything except the 30s. under the Guardianship of Infants Order, and on Oct. 21, 1957, in the course of correspondence which we have seen between the respective solicitors, the husband's solicitor wrote to say that the husband proposed to discontinue the voluntary allowance. Thereupon, on Jan. 4, 1958, the wife made

her complaint of wilful neglect to maintain, the dismissal of which is the subject of the present appeal. The learned magistrate having dealt with the case at every stage, we have had the advantage of seeing the considered statements of his reasons, not only on the present complaint, but on the other two cases as well. It is only just to him to pay tribute to the great care that he has manifestly taken at every stage of what is by no means an easy case.

The material facts are as follows. The parties were married on Oct. 2, 1948. It is evident from one of the magistrate's findings that the marriage went reasonably smoothly until the birth of the child on Mar. 13, 1952. It appears, however, that the husband was always more interested in the sexual side of life than the wife was. The wife's confinement was very difficult. The magistrate found that thereafter the wife suffered from some mental or nervous disorder which was either caused or gravely aggravated by the birth of the child. She suffered from periods of acute depression which got progressively worse, and she developed an invincible repugnance to sexual intercourse which, although he had heard no medical evidence at the first hearing, the magistrate described as being

> " as real and as overwhelming as a physical disability which made sexual intercourse impossible "

and said that this state of things was in no way attributable to wilfulness on her part. It is right to say that those conclusions, formed, as I have said, without the assistance of medical evidence, were amply confirmed in the two subsequent cases by the evidence of a Dr. Hendy, whose evidence the magistrate unreservedly accepted.

Dr. Hendy said amongst other things that the neurosis produced an acute revulsion to sex relations, over which he believed her to have no control; that if she were to return to live with her husband he feared that the result would be disastrous. Asked by the magistrate to say exactly what he meant, he said she might go over the border into insanity, or over the border into physical disability. The effects would be comparable in any case: that there would be a serious breakdown in her health so as to make her incapable of living a normal life. The doctor did not think that living with her husband on condition that there was no sexual intercourse was a reasonable condition for either of them. He thought that the fact that the wife could not bear to be near to her husband was largely due to the sex phobia, a manifestation of the neurosis, but that it extended to proximity to men generally, and added that the very fact that a man was near her would set her in a state of anxiety. The doctor gave as one recent example of this an occasion when the wife met her husband accidentally. Questioned by the magistrate about a sexless return to cohabitation, the doctor accepted that he meant that even so a reaction might occur when the wife heard the husband's voice or if he were to touch her. He made it clear that this was apart from actual sexual acts, and that he was speaking of the mere fact of having to return and live under a communal roof; repeating that he feared that it would be disastrous to her mental health to return to her husband at all. He said that there was nothing wilful about this state of things at all; that it was an illness.

Cross-examined, he said that he accepted that the wife was rational and in normal mental health " except so far as it related to her husband "—and to other men. It seems to me that the exception goes to the root of the matter, and I will return to this later. The doctor did not think that there was any great difference in her condition as between Aug. 8, 1957, and the day on which he was then giving evidence. He also said in cross-examination that it was his firm belief that it was not possible for her to join her husband in his house on any terms

whatever. Finally, in answer to the stipendiary magistrate, he made it quite clear that he was satisfied that the wife could not be said to be "playing-up", and that he thought that he would have spotted the symptoms if she had been doing so; that she was probably all right living a quiet life apart from her husband, but was "just managing on very thin ice", and that the possibility of a relapse could not be ruled out.

It is common ground that sexual intercourse had never taken place since some date in February, 1952, that is to say, before the birth of the child. On Oct. 2, 1952, the wife's condition was such that she was admitted as a voluntary patient to the Delapole Hospital at Hull, which is, as I understand, the mental hospital for that district. Dr. Hendy was at all material times the assistant psychiatrist at that hospital, and had the wife under his care while she was there. On Aug. 18, 1953, on her written request sponsored by the husband, she was allowed to return home. It is evident that this period of leave was not a success, as the wife is said to have suffered from attacks of dizziness described as black-outs, and she returned to the hospital on Sept. 15, 1953, where, subject to short absences, she remained continuously until June, 1956, when she went to live with her mother and the child. Thereafter she has visited the hospital regularly as an out-patient and has been seen by Dr. Hendy about every two or three weeks. [HIS LORDSHIP stated that between April and the end of June, 1954, the wife went home for week-ends, in an attempt to get herself rehabilitated and the parties occupied separate bedrooms. HIS LORDSHIP then read a letter dated Aug. 2, 1954, written by the husband to the wife with the intention of stopping her from returning to the matrimonial home and on which the magistrate at the hearing on Oct. 12, 1954, found the husband guilty of desertion. HIS LORDSHIP then referred to a letter from the wife dated Sept. 8, 1955, in which the wife said that there was no chance of a reconciliation; to two letters dated July 21, and Aug. 1, 1956, written by the husband to the wife after she had left hospital in which the husband, on the erroneous assumption that the wife was fully recovered, suggested a reconciliation; and to a further letter by the husband dated Apr. 1, 1957, to which the wife replied on Apr. 3, 1957, stating that from a medical point of view it was impossible for her to return to live with him. HIS LORDSHIP then referred to the husband's letter dated Apr. 17, 1957, in which he twice expressed regret for his letter of Aug. 2, 1954, and suggested that if she returned they could occupy separate bedrooms as in 1954. HIS LORDSHIP then referred to the discharge by the magistrate of the order of Oct. 12, 1954, on the ground that the husband had offered to resume cohabitation and the wife had refused and continued:] Not only was there no appeal against the magistrate's decision on Aug. 23, 1957, to discharge the order of Oct. 12, 1954, but the trial of the wife's present complaint was conducted below, and on this appeal, on the basis of an unqualified admission that the magistrate's decision of that case was unexceptionable. Accordingly, the wife's complaint, on the cessation of any maintenance for her after Sept. 6, 1957, of wilful neglect to provide reasonable maintenance must be dealt with on the footing that it is accepted that the husband had put an end to the state of desertion created by his letter of Aug. 2, 1954. Further, it was naturally conceded that if the husband, by the discharge of the order of Aug. 23, 1957, had ceased to be a deserter, and the wife's persistent refusal to resume cohabitation created a situation in which she herself became the deserter, there would be an end of her case. Conceding that the husband had ceased to be a deserter, the wife's case is that she has been and still is prevented by the state of neurosis from which she suffers in relation to life with her husband, and that this is a grave and weighty reason justifying her in not resuming cohabitation, even though it does not emanate from any misconduct on the part of the husband; that if she is not a

deserter (there being no question of adultery) the husband is liable to maintain her by the common law of England, and therefore his deliberate refusal to do so amounts to wilful neglect.

It must be recognised, I think, that the stipendiary magistrate has actually held the wife to be " in desertion ". In the last part of his judgment the learned magistrate said that he considered that the second and third points made by the husband's solicitor must prevail. These points were: (second) that the husband had no legal liability to maintain his wife because he was not guilty of any matrimonial misconduct, and (third) that the wife is herself now in desertion, and therefore not entitled to the order sought at all. He added that these points are not necessarily corollaries, and that even though it be assumed that the wife was not in desertion, the husband had not, in his view, wilfully neglected to maintain her. I do not think, particularly having regard to other observations, that the finding of desertion by the wife is really qualified by the final observations. If so there is no more to be said, so long as that state of things continues. But I doubt whether it is right to hold that the wife is a deserter.

The stipendiary magistrate stated that he assumes, on the part of the wife, a physical capacity to resume cohabitation and a mental capacity to make a rational decision and to form an intention to desert. Having regard, however, to the medical evidence already mentioned, the antithesis between physical and mental capacity seems to me to be of doubtful validity. The wife's assumed capacity to make a rational decision is based on Dr. Hendy's answer to the question already quoted, which itself contains the words " except so far as it relates to her husband ", in assenting to which Dr. Hendy said " and to other men ". In the course of the argument we intimated that we were not convinced that a woman suffering from an illness causing the reaction to the mere presence of her husband, or anyone of the male sex, as described by Dr. Hendy, without any question of wilfulness about it, could properly be assumed to be capable of making a rational decision to return to cohabitation or to desert. I am still of that opinion. I think that the stipendiary magistrate was wrong in rejecting the guidance of the Court of Appeal in *Keeley* v. *Keeley* (1), on the grounds that the wife is no longer in hospital. In my opinion, the undisputed medical evidence establishes that, although no longer in hospital, she was just as incapable of resuming cohabitation, whether one describes the incapacity as physical or mental, as the wife in *Keeley* v. *Keeley* (1), would have been held to be if the issue had been properly raised. For these reasons I do not agree with the stipendiary, magistrate that all the elements necessary to constitute desertion were present.

What, then, is the result? Counsel for the wife, in final analysis, founded the wife's case on *Keeley* v. *Keeley* (1), and in particular the passage in SINGLETON, L.J.'s judgment, where he says:

> " If the respondent is stricken by illness which compels him or her to be in hospital for the relevant period, it is difficult to see that the petitioner can prove desertion without cause; and it seems to me that this reasoning would apply equally in the case of mental illness as it would in the case of (say) prolonged heart disease. In either case it should be pleaded and argued."

He also relied on the statement of the common law in *Jones* v. *Newtown & Llanidloes Guardians* (2) per EARL OF READING, C.J., and per SHEARMAN, J., *Tulip* v. *Tulip* (3); and *National Assistance Board* v. *Parkes* (4) in the Court of

(1) [1952] 2 T.L.R. 756.
(2) 84 J.P. 237; [1920] 3 K.B. 381.
(3) [1951] 2 All E.R. 91; [1951] P. 378.
(4) [1955] 3 All E.R. 1; [1955] 2 Q.B. 507.

Appeal, and particularly on the judgment of DENNING, L.J. In a very forcible argument, therefore, he submitted that, the wife not being in desertion, though living apart, and there being no question of adultery, the husband is liable to maintain her at common law, and that he has not done so since he deliberately stopped what was described as the voluntary allowance of 30s.; and, therefore, he is guilty of wilful neglect to provide reasonable maintenance within s. 4 of the Summary Jurisdiction (Married Women) Act, 1895.

As to *Jones* v. *Newtown & Llanidloes Guardians* (1), it is to be observed that the decision was that the guardians could recover from the husband the cost of the wife's keep incurred by them, thus being in line with the National Assistance Board cases to which I will refer; and to do so on the ground that the wife, a deserter of long standing, had ceased to be so on becoming a pauper lunatic chargeable to the guardians. It is right to point out, without detracting at all from the validity of the exposition of the common law, which has frequently been followed with approval, that the last ground of the decision did not receive unqualified approval in the House of Lords in *Crowther* v. *Crowther* (2).

As to *National Assistance Board* v. *Parkes* (3) and the judgment of DENNING, L.J., in the Court of Appeal, COLLINGWOOD, J., and I, sitting in this court, reviewed the whole question in *Pinnick* v. *Pinnick* (4). I consider that I am bound by that judgment. Even if I am not so, I adhere to it, not less so because it attracted favourable comment in 73 L.Q.R. 453-455. I do not propose to repeat our reasons now. Suffice it to say that we pointed out that in the Divisional Court in *National Assistance Board* v. *Parkes* (3), LORD GODDARD, C.J., having explained the practical meaning of a husband's liability at common law, recognised the validity of *Baker* v. *Baker* (5) and the cases in which it has been followed, and pointed out the distinction between decisions under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, and claims brought by the National Assistance Board under s. 42 and s. 43 of the National Assistance Act, 1948. We also doubted whether a case of the latter class was the appropriate occasion for overruling what appeared to be settled law in the former class, especially as judgments of the Court of Appeal were involved, and whether reasoning based on a minority view expressed by DENNING, L.J., in *Price* v. *Price* (6) was sound. We also expressed the opinion that there was no necessary conflict between *Tulip* v. *Tulip* (7), *Baker* v. *Baker* (5), and similar cases down to *Price* v. *Price* (6), in effect because the latter group dealt with the question of the right of a separated wife to maintenance, whereas *Tulip* v. *Tulip* (7) dealt with the reasonableness of the amount in the case of an agreed separation.

In this case there was plainly no agreement, either that the wife should live apart or that she should be maintained as a separated wife. The husband is admitted not to be in desertion, and I am assuming that the wife also is not so. The wife only attempts to justify her refusal to cohabit on a ground which involves "no matter of complaint against her husband": see 12 HALSBURY'S LAWS (3rd Edn.) 482, para. 1077. In my opinion, we should not be justified in abandoning the principles laid down by this court in *Baker* v. *Baker* (5), *Stringer* v. *Stringer* (8), *Starkie* v. *Starkie* (*No. 2*) (9), and other cases, or by the Court of

(1) 84 J.P. 237; [1920] 3 K.B. 381.
(2) [1951] 1 All E.R. 1131; [1951] A.C. 723.
(3) [1955] 3 All E.R. 1; [1955] 2 Q.B. 507.
(4) 121 J.P. 256; [1957] 1 All E.R. 873.
(5) (1949), 66 (pt. 1) T.L.R. 81.
(6) 115 J.P. 468; [1951] 2 All E.R. 580; [1951] P. 413.
(7) [1951] 2 All E.R. 91; [1951] P. 378.
(8) 116 J.P. 102; [1952] 1 All E.R. 373; [1952] P. 171.
(9) 118 J.P. 59; [1953] 2 All E.R. 1519.

Appeal in *Chapman* v. *Chapman* (1), and by the majority of the Court of Appeal in *Price* v. *Price* (2), in which case HODSON, L.J., said:

> "The question of [the wife's] right to maintenance may depend on whether she is a deserter or whether she is deserted or whether there is a contract between them. I do not think that the law recognises a sort of undefined condition where parties are living apart in conditions which may be described as of drift, or in some not very clearly defined condition in so far as rights to maintenance are concerned."

Nor do I think that we ought to ignore the line of decisions in this court that wilful neglect to provide reasonable maintenance involves an element of misconduct—and to do both on the strength of a dictum that the wife is entitled to maintenance because she is a wife, and that *Baker* v. *Baker* (3) and the other cases I have mentioned are over-ridden.

National Assistance Board v. *Wilkinson* (4), and *National Assistance Board* v. *Parkes* (5), decide that if the wife is a deserter the husband cannot be made to contribute to any public assistance given to the wife, but that if she is not in desertion, and there is no question of adultery, the National Assistance Board has an independent right against the husband under s. 42 and s. 43 of the National Assistance Act, 1948. It is true that under s. 43 (5) (b) the National Assistance Board can obtain an order to pay the money to the wife, but this, I emphasise, is an order made by virtue of the express liability of the husband to maintain his wife under s. 42 and does not necessarily impute a finding of wilful neglect. In my opinion, that is the true solution of this difficult case. But I do not think that in the circumstances the husband can be found guilty of wilful neglect to provide reasonable maintenance. I, therefore, agree with the learned stipendiary magistrate's conclusion, although I differ from some of his reasons. Accordingly, the appeal will be dismissed.

HEWSON, J.: I agree with LORD MERRIMAN, P., and would add that in my view the learned stipendiary magistrate was right in holding, on Aug. 23, 1957, that the husband was no longer in desertion of his wife. I cannot accept, however, that the wife became a deserter through her refusal to return under the matrimonial roof. She, through her acute state of neurosis, over which she had no control, was quite unable to return to cohabitation with her husband. The uncontradicted medical evidence of Dr. Hendy, which must be looked at as a whole, establishes in my mind that while she was capable of exercising free and reasoned thought in other matters she was quite incapable of such exercise in relation to being under the same roof as her husband, or, indeed, any other man. Dr. Hendy described her case as exceptional, and was of the opinion that a return to her husband would be disastrous to her mental health. As I have said, for my part I cannot, in these extreme circumstances, regard her as a deserter.

If I am right then we are left with the situation that neither party is in desertion of the other. Neither party has a legitimate ground of complaint against the other, and I cannot see that the husband can be found guilty of wilful neglect to provide reasonable maintenance for his wife, for, on the evidence, I see no element of misconduct in his attitude. It may be that the answer to this difficult case lies in s. 42 and s. 43 of the National Assistance Act, 1948, but having in mind and agreeing with what the learned President has said, I think that this appeal should be dismissed. *Appeal dismissed.*

Solicitors: *Dawson, Loncaster & Co.*, Hull; *Smith & Hudson*, for *Williamson, Stephenson & Hepton*, Hull. G.F.L.B.

(1) (Apr. 7, 1951), unrep.
(2) 115 J.P. 468; [1951] 2 All E.R. 580; [1951] P. 413.
(3) (1949), 66 (pt. 1) T.L.R. 81.
(4) 116 J.P. 428; [1952] 2 All E.R. 255; [1952] 2 Q.B. 648.
(5) [1955] 3 All E.R. 1; [1955] 2 Q.B. 507.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., CASSELS AND STREATFEILD, JJ.)

October 15, 16, 17, 1958

WORKING MEN'S CLUB AND INSTITUTE UNION, LTD. *v.* SWANSEA CORPORATION

Rating—Relief—Organisation not established or conducted for profit—Organisation whose main objects . . . "are . . . connected with the advancement of . . . social welfare"—Central organisation formed to encourage working men to form clubs—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *and* 5 *Eliz.* 2 *c.* 9), *s.* 8 (1) (*a*).

In 1862 the appellant union was formed to encourage working men to band together in working men's clubs. By 1888 the union was very nearly self-supporting, and on April 18, 1889, it was registered under the Industrial and Provident Societies Act, 1876. By 1889 the number of clubs which were members of the union was 384; by 1925 2,469, and by 1955 3,420, with a total membership of just under two millions. By r. 2 of its rules the objects of the union were stated to be: "To carry on the business of general advisers, teachers of the doctrine of association for social or ameliorative purposes, publishers, stationers and booksellers, general traders, agents and manufacturers, both wholesale and retail, of any article which may assist the development of clubs or their members; to provide and maintain convalescent homes, or other institutions for the benefit of the members or wives or children or dependants of the members of clubs which are members of the union. The union shall have full power to do all things necessary, expedient, or considered by it desirable for the welfare and protection or assistance of, or helpful in any manner to, its members, and for the accomplishment of all objects specified in its rules." The appellants appealed to quarter sessions against the amount of rates assessed to be paid in respect of a convalscent home maintained by it, contending that it was entitled to relief under s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955 as "an organisation . . . not established or conducted for profit and whose main objects are . . . concerned with the advancement of . . . social welfare." The deputy recorder held that the appellants were an organisation which was not established or conducted for profit, but that their main objects were not concerned with the advancement of social welfare, and they were, therefore, not entitled to the relief claimed. The appellants appealed.

HELD: (i) that, as the profits made by the appellants were not distributed like those of a commercial company nor returned to the members, the deputy recorder had rightly held that the organisation was not established or conducted for profit; (ii) (CASSELS, J., dissenting on this point) that, though the member clubs could not qualify for relief, as there was not in their case the public element necessary to constitute "social welfare," the original object of the appellants as the central organisation, namely, that of encouraging working men to form working men's clubs, had persisted throughout and did fall within the words "advancement of social welfare." The appellants were, accordingly, within the words of s. 8 (1) (a) and the appeal must be allowed.

CASE STATED by the deputy recorder of Swansea.

The appellants, the Working Men's Club and Institute Union, Ltd., appealed to Swansea quarter sessions against an amount of rates assessed on them in respect of their convalescent home at Langland Bay, claiming that they were entitled to relief under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, as "an organisation . . . not established or conducted for profit and whose main objects are . . . concerned with the advancement of . . . social welfare."

The following statement of facts is taken from the judgment of LORD PARKER, C.J. The history of the appellants is as follows. In 1862 there was formed what was called the Working Men's Club and Institute Union. It did not then have the "Limited" as part of its name. It was formed in order to encourage persons, referred to as the working men, to band together in working men's clubs.

It appears from a history of the union, published in 1927, that the union owed its beginning

> " to a Unitarian clergyman, the Reverend Henry Solly, a passionate soul, keenly conscious of the low level of working-class life, keen and eager to raise its habit and character, who saw in the establishment of working men's clubs an instrument to his purpose."

It goes on to refer to a meeting in 1862, presided over by LORD BROUGHAM, who was Lord Chancellor at the time. The union continued to have very eminent vice-presidents thereafter. In 1875, when Lord Rosebery was presiding, a speech of his, which is set out in the book, contained the following passage:

> " The principle on which the Working Men's Club and Institute Union is based is that the working men are to be raised by their own endeavours, and are not to be patronised, and fostered and dandled. All that is to be done for the working men is to be done by themselves. What a man does for himself is worth ten times as much as what can be done for him by anyone else . . . This union is a central authority which guides and supports the spontaneous endeavours of the working men living in provincial towns. It lets fall the good seed in places where it has not hitherto fallen, and what is even of more importance than this, it embodies the entire experience of the movement from its very foundation, and is, therefore, able to give the best advice to all clubs which may need it. The influence of this central authority is felt all over the country."

Then, in setting out various of the considerations he says:

> " Thirdly, they ought to set before their members some object higher than the mere social object of getting a comfortable place in which to meet."

The union prospered. It got more and more clubs formed, and those clubs became its members, and it appears that

> " From 1875 onward, the distinguished patrons gradually faded away, as the era of democratic government and self-support dawned and developed."

By 1888 the union was very nearly self-supporting, and on Apr. 18, 1889, it was registered under the Industrial and Provident Societies Act, 1876. The book says that the union was registered, as are almost all co-operative societies, under the Industrial and Provident Societies Act, and rules were drafted with the assistance of certain gentlemen and adopted. So complete were they, that although they have been subject to slight subsequent amendment, principally to give effect to the more complete representation of the provinces on what is now really and truly a national executive (though often misnamed "the London Executive "), this constitution of the union, completely democratic, has remained almost as first drafted. Then there appears a table showing the progress of the union between 1887 and 1925. By 1889, that is to say, the time of registration, the number of clubs who were members of the union was some 384 ; by 1925 it had risen to 2,469, and by 1955, the relevant year that is under consideration, the organisation had some 3,420 clubs as members, and those 3,420 clubs themselves had a total membership of just under two millions.

In the chapter headed " The Union's Aim ", there appears this:

> " Briefly to state these ideals and beliefs. The first aim and ideal of the union is to secure for the workman a higher and wider level of happiness in his leisure hours and in his daily personal and civic life. And the principal belief of the union is that this can best be achieved by the workman himself, free from assistance, interference, or dictation by others. Supplementary

to this, or part of this task, is to afford guidance and assistance in every amplification and ramification of all that is comprised within it. To make its club members self-reliant, through common effort, to train them in skill in self-government individual as well as corporate, to assure that their efforts 'for themselves and by themselves' shall be fruitful, both in individual, domestic and the common good, that both the member, his dependants and the community shall be the better because of the clubs' establishment, those were the ideals of the founders, they are the ideals of the union now."

The booklet says:

"Whilst it would desire every bona fide club to be within its ranks, it asks no club to join, and very closely scrutinises the character of any club which seeks membership . . . There are publications issued by the union which advocate the establishment of working-class clubs, and, if any group of men get together in spontaneous local effort, with the object of forming a club, or call a meeting to consider the subject, the union will send a speaker and adviser. This is the whole of its propaganda. It has no paid organisers, no peripatetic proselytising preachers . . . And if at the very beginning the men who think of promoting a club find contact with the union, then from the beginning all is well with the child. And here can be set out just what the union does. Its aim is that every club born shall grow up to health and usefulness. To that end it must be reared upon a basis of legality and right conduct, moral and material. The union secures that it shall begin on right lines and makes the path straight."

The book sets out the legal advice it gives and, indeed, boasts that it has never been found wrong on a point of law. That appears from the short history.

Under the Industrial and Provident Societies Act, 1876, rules had to be registered. The only rules before the court were the recent rules, dated 1956. At any rate, as far as the objects of the union were concerned, they were the same to all intents and purposes as they were in 1889 when registration took place. They were in these terms: Under "Name": "The society shall be called the Working Men's Club and Institute Union, Ltd."; that is because, under the Act, it becomes incorporated. Then under para. 2;

"The objects of the union are: To carry on the business of general advisers, teachers of the doctrine of association for social or ameliorative purposes [I pause there for a reason I will state in a moment; and then it goes on] publishers [that is, to carry on the business of publishers], stationers and booksellers, general traders, agents and manufacturers, both wholesale and retail, of any article which may assist the development of clubs or their members. To provide and maintain convalescent homes, or other institutions for the benefit of the members or wives or children or dependants of the members of clubs which are members of the union. The union shall have full power to do all things necessary, expedient, or considered by it desirable for the welfare and protection or assistance of, or helpful in any manner to, its members, and for the accomplishment of all objects specified in its rules."

The deputy recorder held that the appellants were an organisation which was not established or conducted for profit, but that their main objects were not concerned with the advancement of social welfare, and on that ground he dismissed the appeal. The appellants appealed.

Molony, Q.C., and *J. M. Milne* for the appellants.
Squibb, Q.C., and *B. M. Rees* for the rating authority.

LORD PARKER, C.J.: This is another of those difficult cases arising out of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The relevant words of the section are as follows:

> " (1) This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare . . ."

This case comes before the court on a Case Stated by the deputy recorder of Swansea Borough Quarter Sessions, before whom the appellants, the Working Men's Club and Institute Union, Ltd., appealed against an amount of rates assessed on them in respect of their convalescent home at Langland Bay, Swansea, claiming that they were entitled to relief under the section to which I have referred. [HIS LORDSHIP stated the facts as set out above and continued:] In my view, properly read, the objects clause is setting out a main object, namely, to carry on the business of general advisers and teachers of the doctrine of association for social or ameliorative purposes, and under the name of the Working Men's Club and Institute Union, Ltd. All that follows, in my view, although stated as objects, are really the means whereby the object stated in the first three lines is going to be carried out. That is all that I need state of the facts at the present stage.

The first question is whether this organisation, to use the words of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), is established or conducted for profit. That it makes profits which are profits for the purposes of taxation is perfectly clear. It owns very considerable securities, which earn interest, and properties and, to take the position of the general fund, in the annual report of 1955 it shows that the interest on certain securities alone amounted to £4,445 12s. 7d., and in addition there was bank interest and interest on Co-operative Wholesale Society Bank Deposit Account, so that it clearly makes profits in that sense. Its receipts, apart from the interest on securities, are the annual payments of the member clubs, who pay a maximum of £2 a year—it is 10s. for each hundred members, with a maximum of £2. In addition, however, it gets a very large sum by way of receipts from what are called associate and pass cards, which enable a member of any member club to be an honorary member of other member clubs.

Now it has been said more than once that the fact that an organisation makes profits is, of course, not the question to be considered. The question is: Is it established or conducted for profit? The matter was referred to by LORD DENNING in *National Deposit Friendly Society (Trustees)* v. *Skegness U.D.C.* (1) where, in dealing with the friendly society in that case, he said:

> " Looking at the way in which the society has conducted its affairs, I am of opinion that it has made profits. It has not distributed those profits like a commercial company. Nor has it returned them to members. It has used them to build up large and accumulating reserve funds. But the fact that the society has made profits does not mean that it is ' conducted for profit ', which I take to mean ' conducted for the purpose of making profit '. Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit."

(1) [1958] 2 All E.R. 601.

Everything that LORD DENNING said there, as it seems to me, applies in the circumstances of this case. I agree with the deputy recorder's finding that here this organisation was not established or conducted for profit.

The next question is whether its main object is the advancement of social welfare. Those words have given rise to great difficulty, and, perhaps wisely, nobody has yet laid down what is considered an exhaustive definition of those words. Indeed, it has been said that the words " social welfare " alone, leaving out their context in that section, and the words " advancement of " which precede them, are of the very widest character. The question here is: Was the main object for the advancement of social welfare ?

It is perfectly clear that the member clubs themselves could not come within those words and qualify for relief. The individual clubs are members banding together for their own advantage and benefit, and there is not there the public element which all agree, I think now, must be present if an organisation is going to fall within the section. But the question remains: What is the position of the union, the appellants, the central, organisation as it were ? I confess that it is a matter which has given me considerable doubt. If, of course, member clubs which had formed over a period of years decided to band together for their own advantage and form a central organisation or union which would assist them and benefit them and to which they paid contributions, I think that the matter would fall directly within the decision in *National Deposit Friendly Society (Trustees)* v. *Skegness U.D.C.* (1) and that the central body could not qualify for relief.

That is not, however, this case. This case, as it seems to me, is the case of an organisation originally, in 1862, setting out to encourage the working man to form these working men's clubs, and I think that the encouragement of men to do that would fall fairly and squarely within the words " advancement of social welfare". Indeed, if the matter rested there, I do not think that counsel for the rating authority would deny that result. The matter does not, of course, rest quite there, because a time came when this organisation became self-supporting: when it had become so successful, if you like, that the activity of encouraging working men directly to band together had rather fallen into the background, and when the main activity consisted of helping the clubs which had already been formed and which had become members.

The proper approach here, as in all these cases, is to consider first the written constitution and the objects there laid down. It is only in two events that one is entitled to go outside those objects. One is that if, on a reading of the constitution, it is impossible to see which are the main objects out of a series of objects, then one is entitled to look at the activities; secondly, even if one can find what appears to be a main object in the constitution but it is ambiguous, again one would be entitled to look to the way in which the organisation has acted. Accordingly, I would look, first, at r. 2, which I assume, as I said, was to all intents and purposes the same rule as in 1889 and it seems to me, on a reading of that rule, that one arrives at one main object, namely, to carry on the business of general advisers and teachers of the doctrine of association for social or ameliorative purposes.

Those very wide words, as it seems to me, fall plainly within the description of having an object for the advancement of social welfare, and I doubt very much if one is entitled to go any further. I would add that it seems to me that in the present case the deputy recorder has not followed that course: indeed, he barely refers to the construction of r. 2, but looks directly at the activities of

(1) [1958] 2 All E.R. 601.

the organisation and comes to the conclusion that the first activity, which he holds to be the main object, was, if I may put it quite generally, to benefit the member clubs and their members. Now it seems to me that, even if one is entitled to go outside r. 2, there is no reason for beginning the consideration at the year 1889, when this organisation was incorporated. Of course, there might have been completely new objects then, but, on the interpretation that I have stated, that is not this case. From the very beginning the object here has not been to benefit the members; the main object has not been to benefit such clubs as become members, but to encourage the working men to band together to form clubs, and then, incidentally, to assist those clubs which are formed and which do become members and, if only by example, to encourage the working men to form further clubs. This is certainly not a case where that object has been exhausted. It is true that there is a very large membership, but it is noticeable that, between 1925 and 1955, no fewer than one thousand new member clubs have joined, and it is said that the working man himself is the best missionary: that he may go from his own district to another preaching the benefits of his local working men's club. I am satisfied that the original object has persisted throughout, and, although it may be that to-day the chief beneficiaries are the member clubs, nevertheless the original object remains. If I may repeat again, this is not a case of clubs which have banded together into a central organisation for their own benefit, but of a central organisation beginning to encourage the growth of clubs and, when those clubs are formed, incidentally to benefit those clubs.

Accordingly, I take the view, as I said not without considerable doubt, that this organisation has shown that it comes within the section. I would allow this appeal.

CASSELS, J.: It is with no little diffidence that I find myself unable to agree with the conclusion at which my Lord has arrived.

The working men's club movement goes back into history, and doubtless in its early days one finds that men of eminence have come together at meetings to encourage working men to form themselves into clubs, which in fact they had at that time in some instances formed, and to encourage further the increase or the wider spreading of the movement whereby the working men themselves had made their own places where they could have recreation and the advantages of association and, incidentally, the advantages of beer to be drunk in pleasant surroundings and of meeting their fellows while they were so enjoying themselves. It is a movement which has spread.

This appeal, by way of Case Stated, comes before this court because the appellant Working Men's Club and Institute Union, Ltd., which, indeed, has a very long history, desires to succeed in an appeal against the rating of one of its convalescent homes, and among the advantages of belonging to a working men's club is that not only can the members get reasonable and cheap recreation and refreshment, but also that the members, by reason of a contribution which is made by the individual club to the union, can obtain the advantage of attending a convalescent home. This home was rated at one time at a figure which, under this recent valuation for rating purposes, has been multiplied by five, and the very natural course for the union to adopt is to carry this case to higher courts in order to see whether they do or do not come within the partial relief —indeed, I think I may say the temporary relief—which is granted under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. This enactment provides that relief shall be given in relation to:

> " any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

I agree with my Lord, if I may say so with respect, and I am satisfied that the appellants here have not a business which was established or conducted for profit. It would be difficult to say that they do not come within that part of the section.

What we are mostly concerned with is whether they come within the words " social welfare ". For that purpose I am prepared to go to the objects of the union, which are, as I read here:

> " To carry on the business of general advisers, teachers of the doctrine of association for social or ameliorative purposes, publishers, stationers and booksellers, general traders, agents and manufacturers, both wholesale and retail, of any article which may assist the development of clubs or their members. [Then there is a further passage which seems to divide these objects a little bit] To provide and maintain convalescent homes, or other institutions for the benefit of the members or wives or children [incidentally, that is where one finds that the wives of members can obtain the benefit, but according to learned counsel appearing for the respondents here wives and children, I understand, do not get these benefits] or dependants of the members of clubs which are members of the union. The union shall have full power to do all things necessary, expedient, or considered by it desirable for the welfare and protection or assistance of, or helpful in any manner to, its members, and for the accomplishment of all objects specified in its rules."

Clubs can become, as clubs, members of this union by the payment of 10s. per hundred members, and the total payment they make is limited to the sum of £2. Then, in addition to that, the union obtains from the clubs a payment of one penny on each card which is sold to the members of the club; which gives them the benefit of associate membership of all other clubs, so anyone who joins the one club and travels anywhere in the country and finds another club which belongs to the union can get the advantages of that club. But that is not the only thing the union does. It exercises, in my view, a considerable control over these clubs. The clubs can be disbanded if they do not comply with certain rules. One rule I have observed is r. 6 (c):

> " A club which supplies intoxicating liquor shall not be admitted, or, if admitted, shall not continue as a member unless it adopts the following rule, or a rule to similar purpose or effect:—' Should any visitor pay for intoxicating liquor served to him he shall at once be removed from the club premises, and the member introducing such visitor may be expelled from membership on the fact being duly proved; and it shall be the duty of any officer or member of the club, becoming aware of such breach of the rules, to report it at once to the secretary or committee '. (d) A club which supplies intoxicating liquor shall not be admitted or, if admitted, shall not continue as a member which shall have bound or shall bind itself to deal with any brewer, distiller or other tradesman."

There is that control which is exercised over individual clubs. Further, if any visitor to a club should go in and pay for drink, then it comes under the castigation of the union. It seems to my mind, speaking entirely for myself, that this union, admirable though its objects may be and worthy as the movement is, does exercise a considerable control over the management of the individual

clubs. In addition to that, the union provides assistance to clubs, helping with their accounts and advising them what they should do. True it is that the union have arrangements whereby speakers may go to any body of men who have banded themselves together and expressly desire to form a working men's club to address them and indicate, doubtless in well-selected phrases, the great advantage of forming a working men's club in that particular neighbourhood. This undoubtedly is of more importance during these times in which we live because new towns are being created and so called. It may well be that in those new towns people will be wanting to form a working men's club.

That it all very well, but the real issue in this case is: Is that social welfare? For what do these people band themselves together? I can see no other reason than their own social benefit, their own recreation and their own enjoyment, and this union, exercising this control, giving them advice and helping them where it can, is doubtless serving a most useful purpose, but is it doing what the Act requires it should do, namely, promoting the advancement of social welfare? The banding together of individuals into a social club is not, in my view, social welfare, and when the learned deputy recorder came to the conclusion that the main object was not otherwise concerned with the advancement of social welfare, speaking for myself, I have come to the conclusion that he was right. I will read the paragraph in the Case:

> "The reasons for this decision were: (i) Counsel for the organisation conceded that the member clubs could not claim the relief granted in s. 8 (1) (a) in respect of their premises [so perhaps we would have not an impossible situation but we would have this, that the units of this union would not be able to claim this relief but the union itself could]. (ii) A main object must, if it is to be 'concerned with the advancement of social welfare', have a substantial element of benevolence, philanthropy, some form of humanitarianism, altruism and a disposition to do good, not merely a desire to promote social pleasure and social activities as a whole."

Now the altruism point is a point which has emerged in the course of the cases which have reached the higher courts, and I quote from LORD DENNING in *National Deposit Friendly Society (Trustees)* v. *Skegness U.D.C.* (1), to which my Lord has already referred. I will not read the whole paragraph, but he says:

> "The words 'social welfare' themselves also connote, to my mind, the concept of public benefit. These words comprehend many objects which are beneficial to the community but are not charitable according to the somewhat limited interpretation given in the charity cases. A person is commonly said to be engaged in 'social welfare' when he is engaged in doing good for others who are in need—in the sense that he does it, not for personal or private reasons—not because they are relatives or friends of his—but because they are members of the community or of a portion of it who need help . . . The difference between the two is that the main objects of the one are directed to the public benefit whereas the others are not."

It is said that this union is for the public benefit because the membership of 3,400 clubs is affiliated, if I may use the word, to the union: their members have become members of the union and have reached the enormous figure of two millions, but I do not think that that makes any difference. I do not see why, if a thing is not social welfare for five hundred, it becomes social welfare when it goes over two millions. This is a limited movement as far as the population is concerned. No club can become a member of this union

(1) [1958] 2 All E.R. 601.

unless it conforms to certain requirements, and, indeed, the record of the union shows that some clubs have left the union, and, of course, others are perhaps coming in; but the mere fact that this is a union of working men's clubs does not make it entitled to come under the social welfare part of the Act of 1955. The learned deputy recorder, in his concluding paragraph, said:

> "The main object of the organisation, although social in character and directed towards providing pleasure and comfort for the members of the member clubs, is not concerned with 'the advancement of social welfare'."

I venture to agree with the conclusion at which the learned deputy recorder arrived and I would dismiss this appeal.

STREATFEILD, J.: In my turn I also have diffidence in differing from my brother CASSELS; and in saying that I agree with my Lord, the Lord Chief Justice, I also share the doubt which he expressed. It is not by any means an easy case. There are two main points for consideration. The first one is, I think, quite simple: it is whether this organisation, the Working Men's Club and Institute Union, Ltd., was an organisation which was then established or conducted for profit. It was said that, because it was registered under the Industrial and Provident Societies Act, 1893, as a business, that automatically pointed to it being established or conducted for profit.

In order to attract or qualify for registration under that Act an organisation must be either an industry or business or trade. This one was clearly neither an industry nor a trade. So, if it were to qualify, it had to call itself a business. It does not follow, in my view, that because the Act contains certain provisions for the distribution of any surplus assets which may exist on the winding-up of an institution amongst the members, that means that it is established for profit. Suffice it to say that I follow the language of LORD DENNING which my Lord has already read out and which I need not repeat, in the *National Deposit Friendly Society (Trustees)* v. *Skegness U.D.C.* (1), and, for the reasons stated by LORD DENNING, which appear to me exactly to fit the present case, I have no hesitation in saying that, although there may be profits which attract tax, this organisation was not established or conducted for profit.

The next point is whether, not being charitable, the union was otherwise concerned with the advancement of social welfare, and it is quite correct, and I agree, that there must be an altruistic basis for the objects of this organisation.

I agree with my Lord, the Lord Chief Justice, that one must go back in order to ascertain the main objects of the business to its history, to its inception, and in the early days it seems to be quite clear that the union was an organisation of, it was said, titled and benevolent gentlemen who desired, within the ideals of the organisation, to foster, if not the promotion of working men's clubs, at any rate their betterment by giving them advice. Had the union been a formation or organisation of existing members' clubs who united together in a union for the betterment of themselves in the first instance, I should have agreed that this could not be for the altruistic social benefit, but this was, in its inception, organised by others for the benefit of working men. I would also stress the passage on p. 68 of the "Short History of the Union", as to the ideals, in its inception, of this organisation. My Lord has read it, but I would stress that the idea behind this very laudable organisation was not only to secure a higher and wider level of happiness in the leisure hours and daily personal and civic life of the working man, but also was that this could "best be achieved by the workman himself, free from assistance, interference, or dictation by

(1) [1958] 2 All E.R. 601.

others ". The whole object of this association was to encourage the running of working men's clubs, to improve them, and gradually, by the example of one set to another, to spread the gospel right through the working community and right through the nation quite unrestricted as to trades and quite unrestricted as to area. The fact that it was at all times the goal of this organisation that eventually the union might become self-supporting, that it should be free from assistance, that it should be for themselves and by themselves, does not, to my mind, detract from the main object of the organisation in its inception, viz., that it was for the benefit of working men and was organised and, in the first instance, financed by titled and benevolent gentlemen. That, to my mind, was the basis of the foundation of the union, and it finds expression in r. 2, which we have to construe. It is only in the event of there being any doubt which is the main object or whether there is any ambiguity in expression that we are entitled, on the authorities, to look at the actual activities of the union, and for that this court is bound by the judgment of the Court of Appeal in *Berry* v. *St. Marylebone Corpn.* (1).

The expressed objects of the union are:

> " To carry on the business of general advisers, teachers of the doctrine of association for social or ameliorative purposes . . ."

I agree that in those words is really the expression of the objects of this union. The other matters which follow in the objects expressed in r. 2 are in effect the means of achieving the main object of being " general advisers, teachers of the doctrine of association for social or ameliorative purposes ". Now, it seems to me, those words quite clearly are the main object of the union, and I do not think that they are ambiguous so as to entitle us to look at the actual activities of the member clubs of the union as it is now carried on. Even if it did, I should find difficulty in holding that, by reason of the success of the union in increasing the membership from something very small to the present 3,400 odd clubs and two million members, and because one can draw a line round about 1890 when the financial position was such that the organisation became self-supporting—it having been at all times the object of the original founders to make the union self-supporting—the organisation, although started as social welfare, ceased to be social welfare from the moment when it became self-supporting, because that successful stage had been reached. I find difficulty in accepting counsel for the rating authority's submission that, from that moment at any rate, the union became an organisation of workmen to help themselves. I do not think that the main object changed when the organisation achieved the success which it had always intended of making itself self-supporting.

For those reasons I have come to the conclusion that this case is not like a mutual insurance benefit case. It is not, as my Lord said, a case of existing clubs uniting and riding on the back of a central organisation in order to improve themselves and encourage other workmen. Indeed, it started at the instance of others to help those others who at that time were not able to help themselves and eventually to bring them to the self-supporting stage I have indicated. Looking at the rule [r. 2 of the union's rules] and construing it as best I can, I have come to the conclusion that the main object of this organisation was an object which was concerned with the advancement of social welfare. Undoubtedly it started as such, and I do not think that anything that happened subsequently prevented it from remaining the advancement of social welfare. I do not think, with respect to my brother CASSELS, that the test is as to how

(1) [1957] 3 All E.R. 677.

much control the organisation had over any individual clubs if, indeed, it had any control. The fact that it laid down certain conditions of membership such as the observance of licensing laws and not being tied to any particular brewers and matters of that sort, is to my mind only part and parcel of the object of teaching and advising clubs as to the proper way of bettering their own clubs. I do not think that that control prevents this organisation from being one for the advancement of social welfare.

For those reasons, therefore, I have come to the conclusion that the Working Men's Club and Institute Union, Ltd., brought itself within the terms of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and I too would therefore allow this appeal.

Appeal allowed.

Solicitors: *Wrentmore & Son*, for *Edward G. Davies*, Pontyclun; *Kenneth Brown, Baker, Baker.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., STREATFEILD AND DIPLOCK, JJ.)

October 22, 1958

RAYMOND *v.* COOK

Local Government—Bye-law—Noise—Prohibition against noisy instrument in street "so as to cause annoyance to inhabitants of the neighbourhood"—Ice-cream van with musical box and amplifier—Need of evidence of annoyance to particular individuals.

A bye-law of a county council provided that no person should for the purpose of selling any article "use any bell, gong or other noisy instrument in any street or public place so as to cause annoyance to the inhabitants of the neighbourhood . . ." The appellant, who sold ice-cream in the streets from a van on which there was fitted an electrical musical-box with an electric amplifier adjustable by the driver, was charged at a magistrates' court with offences against the bye-law on two different occasions. A number of witnesses were called, but only two, one in respect of each occasion, said that in fact they had been caused annoyance by the use of the musical-box. The justices convicted the appellant. On appeal,

HELD: that an instrument could be noisy within the meaning of the bye-law whether it was a musical instrument or not; that it was sufficient to prove that it was so noisy as to be calculated to annoy; and that it is not necessary that there should be any evidence that one or more people were in fact annoyed by the instrument on the particular occasion.

CASE STATED by justices for the county of Southampton.

Informations were preferred by the respondent, H. B. Cook, under the County of Southampton Good Rule and Government Bye-Laws (made July 26, 1926), No. 8, which provided:

> "No person shall for the purpose of hawking, selling, distributing, or advertising any article, shout or use any bell, gong, or other noisy instrument in any street or public place so as to cause annoyance to the inhabitants of the neighbourhood, or to persons assembled in any place of public worship, or public entertainment, or other place of public assembly,"

against the appellant, Ronald John Raymond, that on Mar. 6, 1958, at Horsebridge Road and in Crossland Drive, Westleigh, Havant, for the purpose of

selling he used a noisy instrument so as to cause annoyance to the inhabitants of the neighbourhood.

The informations were heard at Havant Magistrates' Court on Apr. 22, 1958, when the following facts were found. At about 12.35 p.m. on Mar. 6, 1958, Douglas Reginald Rock, a night worker, of 28 Horsebridge Road, Westleigh, Havant, was disturbed by a persistent loud noise like a set of bells amplified from a gramophone record. He was in bed trying to sleep. He looked out of the window and saw that the noise appeared to come from an ice cream van standing about three doors down the road. The series of notes were sounded at intervals, and he heard them seven or eight times, including that outside his house. This disturbance had occurred on other days and on one occasion (not on Mar. 6) he had complained to the driver but found him unco-operative. At about 11.50 a.m. on the same day, John James Bowden, also a night worker, who lived at 1, Crossland Drive, Westleigh, was asleep and he was awakened by musical bells. He also looked out of the window and saw that the noise appeared to come from an ice cream van next door. It moved off after five minutes. He did not complain to the driver as it was part of the ice cream owners' trade to ring the bells, although there was a prominent notice on the van asking people to make complaints if they were disturbed. He had never asked his wife to go and speak to the driver for him. He went to the police as "he had taken just about enough of it". On Mar. 9, 1958, the appellant was interviewed by P.C. Pearce, who told him of the complaints that had been made, and the appellant admitted that he had been using the ice cream van on the two occasions in question. He also said that, if the aggrieved persons had complained in accordance with a notice on the van, he would have co-operated with them. The police officer had himself heard the amplified bells on a number of occasions. They were produced by an electrical musical box playing a tune (which the witness recognised but could not name) with an amplifier whose volume could be adjusted by the van driver. The van was one of a number belonging to Toni's Cream Ices (Portsmouth), Ltd., who hired them out to salesmen selling Toni's ice cream on their own account. The type of musical box and amplifier used on this van was selected after tests to determine which noise was least annoying. The vans had been operating in the area for three years and the company had received no complaints about the musical boxes. It had received at least five or six complaints from residents that they could not hear the van. Five residents living close to Rock and Bowden were called on behalf of the appellant. They all said that the musical instrument on this van had never annoyed them or their families. Three of these witnesses had young children none of whom had been awakened when asleep by the bells from the van. One of the witnesses sometimes failed to hear them at all when he had his wireless on, which he did not have on too loudly because of his children. Another of the witnesses was sometimes on night work, but he had never been wakened by the van when sleeping during the day. These witnesses welcomed the sound from the bells because it indicated to them that the ice cream van was outside, and for this reason they would have minded if it stopped. They were all customers of the van. In the summer the appellant sold about sixty thousand ice creams per week on this round, which he did twice a day. He had only two complaints about the bells but at least ten times as many that they were not loud enough.

It was contended by the appellant that, on a proper construction of the relevant bye-laws, the musical box in question was not a "noisy instrument" within the scope of the bye-laws. On a proper construction of the relevant

bye-laws, it was not enough in order to obtain a conviction merely to prove that one (possibly entirely unreasonable) resident had been annoyed; the prosecution must go further and show in respect of each alleged offence that the inhabitants generally of the neighbourhood, or alternatively that at least two of such inhabitants, had been reasonably annoyed. It was contended by the respondent that the instrument was a noisy instrument within the bye-laws and proof that one inhabitant was annoyed on each occasion was sufficient.

The justices were of opinion that the instrument was a noisy instrument within the words of the bye-law, and that its use by the appellant in a street on each of the occasions in question was likely to cause annoyance to the inhabitants of the neighbourhood, and had in fact caused annoyance to Mr. Rock and Mr. Bowden (whom they found to be reasonable persons). Being further of the opinion that it was not necessary, in order to prove a breach of the bye-law, to call evidence that on each occasion either the inhabitants generally had been annoyed or that more than one of the inhabitants had been annoyed, they convicted the appellant and fined him £1 on each charge. The appellant appealed.

J. D. May for the appellant.
D. A. Grant for the respondent.

LORD PARKER, C.J., stated the facts and continued: This bye-law, No. 8, is one of many similar bye-laws which have come before this court. It reads as follows:

> "No person shall for the purpose of hawking, selling, distributing, or advertising any article, shout or use any bell, gong, or other noisy instrument in any street or public place so as to cause annoyance to the inhabitants of the neighbourhood . . ."

Counsel for the appellant in his careful argument has taken two points. First, he says that, if one looks at other of these bye-laws, one will see that reference is made not only to noisy instruments but to musical instruments, and, accordingly, he says that in this bye-law, a noisy instrument, which is alone referred to, is to be contrasted with musical instruments and that this instrument used on this van was a musical instrument. In other words, provided it is a musical instrument, so counsel argues, it matters not how noisy it is and what disturbance is caused. For my part I entirely reject that argument. An instrument may be a noisy instrument whether or not it is a musical instrument.

Secondly, he says that on the wording of this bye-law no case is made out unless the prosecution prove that at least two of the inhabitants, because the word is used in the plural, have in fact been annoyed. It is undoubtedly true that in this case only one witness was called in regard to each offence to say that he was annoyed. The wording no doubt varies in these bye-laws. Sometimes it is, as here, "shout or use any . . . noisy instrument . . . so as to cause annoyance", and sometimes it is "shout or use a noisy instrument to the annoyance". It has been held by this court [in an unreported case] that, if the words are "shout to the annoyance", the sole question is whether the shouting was such as was calculated to annoy, and, if that be the question, then the justices might be satisfied that the offence was made out even though no evidence was called that any particular person was annoyed. They may from the rest of the evidence and the evidence of the police constable to be satisfied that the noise in question was noise calculated to be an annoyance, but the words, as counsel has pointed out, are "use any . . . noisy instrument . . . so as to cause annoyance". For my part, I read those words in the same sense and as

meaning a noisy instrument such as was calculated to cause annoyance. Indeed, in a case heard earlier this year, *John* v. *Heath* (1) which also concerned the sale of ice cream, this court held that the words really meant "so as to cause annoyance, as were calculated to cause annoyance", and further held that it would be unnecessary in certain cases to call any evidence that any particular people were annoyed. The proper approach to these cases is for the justices to ask themselves first: Was the noisy instrument so noisy as to be calculated to annoy? On that, the facts may speak for themselves, or it may be necessary for them to hear evidence, albeit of only one person; but once they have come to the conclusion that the noise was calculated to annoy, then it is quite unnecessary for them to have any evidence as to who and how many people were in fact annoyed. In the present case the evidence was both ways, but, having heard all the evidence, the justices were satisfied that this instrument was likely to cause, to use their words, annoyance to the inhabitants and, having got to that stage, it seems quite unnecessary to have had evidence that any or even more than one inhabitant was in fact annoyed. The justices approached the matter in a perfectly correct way, and I would dismiss this appeal.

I ought to add that in this case the court has had drawn to its attention and has considered *Booth* v. *Howell* (2) and also *Innes* v. *Newman* (3).

STREATFEILD, J.: I agree.

DIPLOCK: I also agree.

Appeal dismissed.

Solicitors: *John W. Emmerson*, Edgware; *Theodore Goddard & Co.*, for *G. A. Wheatley*, Winchester.

T.R.F.B.

(1) (Apr. 23, 1958), "The Times," Apr. 24.
(2) (1889), 53 J.P. 678.
(3) 58 J.P. 543; [1894] 2 Q.B. 292.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., STREATFEILD AND DIPLOCK, JJ.)

October 22, 1958

R. *v.* OLDHAM JUSTICES. *Ex parte* MORRISSEY

Magistrates—Plea of guilty in absence of defendant—Written submission by accused to court—Submission not read out in open court—Conviction invalidated—Magistrates' Courts Act, 1957 (5 & 6 *Eliz.* 2, *c.* 29), *s.* 1 (2), *proviso* (ii).

The applicant, who was charged with a parking offence, sent to the court a written statement indicating that he desired to plead Guilty and urging matters in mitigation. The statement was not read out in open court, but was handed to the magistrates by their clerk.

HELD, that before magistrates can deal with an accused person in his absence under the Magistrates' Courts Act, 1957, s. 1, the conditions of that statute must be strictly observed, and as one of the conditions prescribed by s. 1 (2) (ii) was the reading of the accused's statement in open court, and, as that had not been done in the present case, the magistrates had no jurisdiction to convict or pass sentence and certiorari must issue to quash the conviction.

MOTION for an order of certiorari.

This was a motion for an order of certiorari to remove into the High Court and quash a conviction and sentence on the applicant, C. D. Morrissey, by the

justices for the county borough of Oldham, sitting as a magistrates' court. The offence with which the applicant was charged was a parking offence. The ground of the application was that the justices had no jurisdiction to convict or sentence the applicant because proviso (ii) to s. 1 (2) of the Magistrates' Courts Act, 1957, had not been complied with.

Irvine, Q.C., and *Binney* for the applicant.

The respondents did not appear.

LORD PARKER, C.J.: The grounds on which this application is made are that the magistrates had no jurisdiction to convict or to sentence having regard to the fact that the conditions of s. 1 of the Magistrates' Courts Act, 1957, were not fulfilled. Section 1 of that Act provides machinery whereby, in the case of certain minor offences, the accused need not attend the court but can, in effect, send in a plea of guilty. The magistrates have power, on considering the notice put in by him, to decide whether they can treat it as a plea of guilty and convict or whether the matter is of a serious nature and should be adjourned for the accused to appear. There is one important condition precedent to the exercise of their jurisdiction under this section, which is provided in proviso (ii) to sub-s. (2) in the following terms:

> "before accepting the plea of guilty and convicting the accused in his absence under this sub-section, the court shall cause the notification and statement of facts aforesaid, including any submission received with the notification which the accused wishes to be brought to the attention of the court with a view to mitigation of sentence, to be read out before the court."

In this case, the applicant put in a written statement in mitigation. It is conceded by the magistrates' clerk that the letter was not read out in court, though he states that it was handed to the magistrates and that to the best of his knowledge the magistrates had full knowledge of it. We all know that these matters have to be dealt with expeditiously, and on this particular day there was a great number of cases to be heard. It seems to me, however, to be quite clear that, before the magistrates can exercise jurisdiction in a case of this sort, they must strictly observe the conditions of the statute. Mere knowledge of the contents of the accused's submission, the mere reading of it to themselves, is not sufficient ; the submission must be read out in open court. That being so, the magistrates had no jurisdiction to convict or to pass sentence in this case, and the order of certiorari must go.

STREATFEILD, J.: I agree.

DIPLOCK, J.: I also agree.

Order of certiorari.

Solicitors: *Amery-Parkes & Co.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, STREATFEILD AND DIPLOCK, JJ.)

October 23, 1958

GRIFFIN *v.* SQUIRES

Road Traffic—Driving on road when unlicensed and uninsured—"Road"—Car park—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 4 (1), *s.* 35 (1), *s.* 121.

The respondent, who did not hold a driving licence and was not covered by third-party insurance, drove, with the owner's permission, a motor car which was parked in a car park for some ten yards during which the car passed through a hedge and came to rest on an adjoining lawn. The car park fronted the London Road, Coalville and entrances to it were, from the south side, the pavement of London Road. At the north-west corner of the car park there was an opening of about fifteen feet abutting a private footpath which led to the grounds of a bowling club and to allotment gardens. The footpath was habitually used by members of the club and by the allotment holders, who had to cross the car park to get to it but was not habitually used by the general public. The car park was owned and maintained by the local authority, and all members of the public were permitted to use it at all times for parking cars without payment. Informations under s. 4 (1) and s. 35 (1) of the Road Traffic Act, 1930, were preferred at a magistrates' court against the respondent for driving a motor vehicle on a road without a licence and for using a motor vehicle on a road while uninsured. Section 121 of the Act defines "road" as "any highway and any other road to which the public has access." The justices held that the car park was not a road, either in itself or as part of the private footpath, and dismissed the informations. On appeal by the prosecutor,

HELD: that, viewed as part of the private property, the car park was not a "road" within the meaning of s. 121, because the public had not access thereto; and, viewed as itself, there was evidence to support the justices' finding that it was not a road, and the appeal, therefore, must be dismissed.

CASE STATED by justices for the county of Leicester.

On June 4, 1958, informations were preferred by the appellant, Henry Thomas Griffin, against the respondent, Judith Ann Squires, alleging that on May 11, 1958, the respondent drove a motor vehicle on a road, namely, the car park adjoining London Road at Coalville, when she neither held a driving licence nor was insured against third-party risks, contrary to s. 4 (1) and s. 35 of the Road Traffic Act, 1930.

The informations were heard at Coalville Magistrates' Court on June 17, 1958, when the justices found the following facts. On May 11, 1958, the respondent, who had never held a driving licence, with the owner's consent, drove a motor car from a stationary position on the car park for a distance of about ten yards in the course of which the car went through a privet hedge dividing the car park from the municipal buildings in London Road and came to rest on the lawn outside the buildings. The car park had a frontage to London Road of 123 feet and was about eighty feet deep. It was bounded on the east by a wall, on the west by a hedge and railings, and on the north by a fence. At the north-west corner of the car park there was an opening of fifteen feet abutting a private footpath which led to the premises of the Coalville Bowling Club and to council allotment gardens, and at the south side the car park was abutted by the pavement of London Road in the middle of which was a flower bed sixty-six feet long and eleven feet wide leaving entrances at either side which were twenty-one feet long and thirty-six feet long respectively. The car park was owned, and maintained at the public expense, by Coalville Urban District Council and all members of the public were allowed to use it at all times for the purpose of parking vehicles without payment. The footpath leading from the north-west corner of the car park was a private path which belonged to the council, but it was used by members of the bowling club and allotment holders who had to cross the car park to reach the footpath, although the bowling club could be reached by an alternative route.

For the appellant it was contended that the car park was a road within the meaning of s. 121 of the Road Traffic Act, 1930, therefore the respondent had contravened s. 4 (1) and s. 35 of the Act. The respondent contended that the car park was not a road within the meaning of the Act. The justices were of opinion that the private footpath was not a road within the Act of 1930 since, although it was a road, it was not one to which the public, other than the members of the bowling club and allotment holders, had access, and, that the car park was not a road within the Act because, while the public had access to it, it was not " a line of communication between places for the use of foot passengers, riders and vehicles " which was the definition of " road " in the OXFORD DICTIONARY; accordingly, the justices dismissed the informations against the respondent. The question stated for the opinion of the High Court was whether, on the foregoing facts, the justices came to a correct decision in law.

Mrs. E. K. Lane for the appellant.

The respondent did not appear.

LORD PARKER, C.J., having stated the facts as set out in the Case Stated, continued: The whole question here is whether the car park can be said to be a road within the meaning of the Road Traffic Act, 1930, s. 121, the relevant words being " highway and any other road to which the public has access ". The justices decided that this car park was not a road within that definition and accordingly dismissed the informations.

Before coming to the question of the car park proper, I should mention that, apart from parking cars, certain people did cross this car park and go through the fifteen foot entrance to the north-west entrance which led to the bowling club and the council allotments. As I understand it, the justices have found that the general public did not habitually use the car park and the footpath to the bowling green and the council allotments but only the club members and the allotment holders. Accordingly, they came to the conclusion, with which I entirely agree, that it is impossible to say that this car park as a part of this footpath leading to the bowling green was a road. It was said in *Harrison* v. *Hill* (1), a case in Scotland, by the Lord Justice-General, LORD CLYDE, that, as is quite clear, " road " means something other than a highway. In other words it is intended to include a wider class of road. He said this:

> " It is plain, from the terms of the definition, that the class of road intended is wider than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or from prescriptive user. A road may therefore be within the definition (1) although it belongs to the class of private roads, and (2) although all that can be said with regard to its availability to the public is that the public ' has access ' to it."

Then he goes on to say this:

> " I think that, when the statute speaks of ' the public ' in this connexion, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the . . ."

premises in that case. Everything that LORD CLYDE said there applies absolutely to the car park as part of the footpath leading to the bowling green and allotments, and I think that the justices were perfectly right.

The second question is: Is the car park, as a car park, a road within the definition ? One thing is perfectly clear; it is at any rate a place to which the public

(1) 1932 S.C. (J.) 13.

generally, to whom LORD CLYDE referred, have access and which they habitually use. Therefore, that part of the definition is amply fulfilled in this case. The question is: Is there anything else that remains to be fulfilled, in other words, is it enough if one finds a place to which the general public have access to say that you then have a road within the definition, or must there be something which as a matter of common sense and ordinary meaning is a road? A number of cases have been referred to. I do not propose to go through them. It has been said many times that it is eminently a question of fact for the justices to say whether a certain space is a road. Having decided that the general public have access to it, they must then go further and ask: Is this place to which the public have access a road? On this matter I need only refer to quite a recent decision of this court in *Heath* v. *Pearson* (1). The facts are quite immaterial, but it was held, dismissing the appeal, that, although the yard in question, Brunswick Yard, might well be a place to which the public had access, that was not enough to bring it within the definition of "road" in the Road Transport Lighting Act, 1927, for it also had to be a road. The justices had found that Brunswick Yard was not a road, and, since the question whether or not a place was a road was primarily a question of fact, the court had no right, even if they had not agreed with it, to interfere with the justices' decision.

I think it was for the justices to decide as a question of fact whether this car park in the ordinary sense could be treated as a road. It seems to me that there must be a limitation of that sort, otherwise any place, as I have said, to which the general public have access could be said to be a road within the definition. There was evidence on which the justices could come to that conclusion. It was eminently a matter for them, and I do not think that this court should interfere. I would dismiss the appeal.

STREATFEILD, J.: I agree, but I confess that I have experienced some reluctance in so doing, because as a matter of common sense it would be intolerable if ill-advised owners of motor cars parked on public car parks were to feel at liberty to let irresponsible young people with no licences try to drive their motor cars in a place where many other cars are collected; for in the course of so doing they might cause great damage to other vehicles and, by reason of the fact that they are uninsured, the policy of insurance would be vitiated and the insurance company would repudiate liability to the owners of vehicles which would have suffered damage. If the definition of the word "road" in the Act of 1930 was in line with that in the OXFORD DICTIONARY and described as a line of communication—whatever may be the position with regard to the private footpath leading from this public car park towards the bowling green and allotments, as to which I think the justices were quite right—I have no doubt whatever that a public car park adjoining a public highway, there being two entrances from the highway on to the car park, is in fact a line of communication from either entrance to any point in that car park, both to and from. If that was the sole test I should undoubtedly come to the conclusion myself that the justices were wrong; but I have to give proper effect to the words in the Act of Parliament, where the offence consists in the act complained of being performed on a road and, by s. 121 of the Road Traffic Act, 1930, road means a highway or other road to which the public has access. Although a car park is, in my opinion, a line of communication, I do not think that anybody in the ordinary acceptance of the word "road" would think of a car park as a road. If we were to hold that this was a road, a piece of waste land by the side of the

(1) [1957] Criminal Law Review 195.

road to which the public could resort for picnics would have also to be a road, and nobody would call that a road. I am, I think, confirmed somewhat in this view when I look at s. 15 (1) of the Road Traffic Act, 1930, which deals with the punishment of persons for driving motor vehicles when under the influence of drink or drugs; in s. 15 (1) the phrase is:

> " Any person who when driving or attempting to drive, or when in charge of, a motor vehicle on a road or other public place is under the influence of drink . . ."

There, clearly, the words " or other public place " are wide enough to embrace a car park such as we have described in this case. If it had been simply " on a road " it may be that a public car park would not be embraced by the word " road ", but in s. 15 (1) there is that distinction between a road and another public place. Unfortunately, under this particular section, s. 4, the word is simply " road " and nothing else, and so in interpreting the word " road " in accordance with its definition in s. 121 I have, albeit with reluctance, come to the conclusion that it was open to the justices to find that this public car park was not a road. For that reason I agree that this appeal must fail.

DIPLOCK, J.: I agree.

Appeal dismissed.

Solicitors: *Alfred Neale & Co.*, for *H. V. Jackson & Co.*, Leicester.

T.R.F.B.

CENTRAL CRIMINAL COURT

(SALMON, J.)

September 22, 1958

R. *v.* MACKINNON AND OTHERS

Criminal Law—Reckless making of statement to induce agreement for acquiring securities—" Reckless "—Dishonesty or fraud—Prevention of Fraud (Investments) Act, 1939 (2 & 3 *Geo.* 6, *c.* 16), *s.* 12 (1)).

By s. 12 (1) of the Prevention of Fraud (Investments) Act, 1939: " Any person who . . . by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces . . . another person—(a) to enter into . . . (i) any agreement for . . . acquiring . . . securities . . . shall be guilty of an offence."

The word " reckless " in this sub-section means " made not caring whether it be true or false ", i.e., a dishonest or fraudulent statement as distinct from one which is made with an honest belief in its truth. The word does not mean merely " very careless ".

TRIAL on indictment.

The first defendant, Frank Hay Livingstone MacKinnon, was charged jointly with other defendants on four counts of an indictment with inducing certain persons to enter into contracts to acquire securities by making reckless statements and forecasts which were misleading, false or deceptive, contrary to the provisions of the Prevention of Fraud (Investments) Act, 1939, s. 12 (1). When the case for the Crown was concluded it was submitted by counsel for the defendant that the jury should be directed that the word " reckless " in the section implied conduct that must amount to fraud, and that, if it were shown that an accused person honestly believed in the truth of what he had said or written, he could not be guilty of an offence under the section.

Maxwell Turner and *J. M. G. Griffith-Jones* for the Crown.

Phillimore, Q.C., and *D. A. Lloyd* for the prisoner, MacKinnon, and *P. A. G. Rawlinson, Faulks, Hirst, R. E. Seaton, Lawton, Q.C., W. McL. Howard*, and *Sebag Shaw* for the other prisoners.

SALMON, J.: The Prevention of Fraud (Investments) Act, 1939, s. 12 (1), so far as it is material, reads as follows:

> " Any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person—(a) to enter into . . . (i) any agreement for . . . acquiring . . . securities . . . shall be guilty of an offence . . ."

It is contended on behalf of the Crown that the word " reckless " in that section means no more than " very careless ", and that, accordingly, anyone who very carelessly makes a false statement, promise or forecast and thereby induces or attempts to induce another to enter into any agreement for acquiring securities commits a criminal offence. According to the Crown's argument, providing the accused person is proved to have been very careless, he is guilty of this criminal offence, carrying with it a maximum sentence of seven years' imprisonment, even if he honestly believed in the truth of what he wrote or said.

It is contended on behalf of the defence that the word " reckless " means not caring whether the statement, promise or forecast be true or false, and that if an accused person honestly believed in the truth of what he has said or written he cannot be guilty of an offence under this section. *R.* v. *Bates* (1) is a clear decision in favour of the Crown's contention, and is supported by an obiter dictum of the Court of Criminal Appeal. *R.* v. *Bates* (1) is a highly persuasive authority, but it is not binding on me.

It is unnecessary for me to say with what profound respect I regard any judgment of DONOVAN, J., who gave the judgment in *R.* v. *Bates* (1), or any observations of the Court of Criminal Appeal. I have, however, the great misfortune to differ from DONOVAN, J., on the true construction of this statute. I do so with misgiving and diffidence, but as I have reached a clear conclusion on the matter I must give effect to it.

It is conceded that the word " reckless " is capable of either of two rival meanings for which the Crown and the defence respectively contend. When a word is used in a statute which may bear one of two meanings I know of no canon of construction that compels the court to adopt the wider of the two meanings merely because it is the wider. The court must look at the word in its context in the statute and decide which meaning Parliament intended it to bear. Moreover, the courts are slow to construe a statute as creating a criminal offence unless the statute does so in the plainest terms.

Ever since the celebrated case of *Derry* v. *Peek* (2) the word " reckless ", used in relation to false statements, strongly suggests a statement made not caring whether it be true or false, that is, a dishonest or fraudulent statement as distinct from one which is made with an honest belief in its truth. I am here construing a statute whose very name is the Prevention of Fraud (Investments) Act, 1939. Its purpose, as it proclaims, is to make general provision for preventing fraud in connexion with dealing with investments. Section 12 (1) deals with false statements, promises and forecasts.

(1) [1952] 2 All E.R. 842.
(2) (1889), 54 J.P. 148; 14 App. Cas. 337.

The cross-heading which immediately precedes this section reads thus: " General provisions for the prevention of fraud ". It seems to me, therefore, that it would be wrong to approach this section on the basis that, unless the language compels me to a contrary view, " reckless " must bear the wide meaning contended for by the Crown rather than the meaning attributed to it in *Derry* v. *Peek* (1).

It would at any rate be surprising if Parliament, in a section creating a number of offences whose very essence is fraud, had included an offence which has nothing to do with fraud. It is to me, at any rate, almost incredible that if that had been Parliament's intention it would have carried it out by the use of the word " reckless ", a word which, used in relation to false statements, has for about forty years generally been understood by common law lawyers to indicate fraud. When Parliament intends, as in the case of a prospectus, that the careless making of an untrue statement shall constitute a criminal offence, irrespective of fraud, it does so in the clearest language. One has only to look at the Companies Act, 1948, s. 44. I can find no such clear language in the section which I am considering.

The Crown relies on the following passage, among other passages, in the judgment of DONOVAN, J., in *R.* v. *Bates* (2):

> " If one analyses s. 12 (1), it is found to deal with three categories of persons who have induced or attempted to induce other persons to invest money. The first is the person who makes a statement which he knows to be misleading, false or deceptive; the second is the person who dishonestly conceals material facts; and the third is the person who recklessly makes a statement, promise, or forecast which is misleading, false, or deceptive. Categories 1 and 2 obviously refer to persons who are dishonest, but, after referring to a person who has knowingly made a false statement or has dishonestly concealed material facts, the legislature, introducing its third category by the disjunctive ' or ', changes its language altogether. It does not specify a person who knowingly makes a misleading, false, or deceptive statement, promise, or forecast, or dishonestly makes it. It simply specifies a person who recklessly makes these things."

I agree that s. 12 appears to deal with three categories of persons. To my mind, however, they all three have the common characteristic of dishonesty. There is very little, if any, difference between categories 1 and 2. It would appear that category 2 is included only ex abundanti cautela to cover the sort of facts that existed in *R.* v. *Lord Kylsant* (3). If any fact that is omitted from a statement, promise or forecast is material, it can only be material in that its omission makes what has been said misleading, false or deceptive. If the omission is dishonest, it can only be dishonest because the person who makes it knows that what he has said is false, misleading or deceptive by reason of the omission. I am inclined to think that category 2 is already covered by category 1.

It is true that the third category is introduced by the disjunctive " or " and involves a change of language which does not include the word " dishonesty ". This point, however, does not greatly impress me. It is to be observed that the word " dishonest ", which is used in the second category, is not used in the first category; and the second category is also introduced by the disjunctive

(1) (1889), 54 J.P. 148; 14 App. Cas. 337.
(2) [1952] 2 All E.R. 842.
(3) [1931] All E.R. Rep. 179; [1932] 1 K.B. 442.

" or ". No one suggests that this is any reason for supposing that the first category does not involve dishonesty.

In my judgment, the legislature intended this section to cover all fraudulent statements, promises and forecasts made for the purposes specified in the section. It might, of course, have read simply: " Any person who dishonestly makes any statement, promise or forecast which is misleading, false or deceptive " and so on. The legislature, however, recites (as is the usual practice in pleadings in civil actions) the well-known elements constituting dishonesty. To make quite certain that it covers the *R.* v. *Lord Kylsant* (1) type of case, it introduces the words " dishonest concealment of material facts ". It is for this purpose essential to use the word " dishonest " because an innocent concealment would be outside the scope of this section.

It has also been argued that as the section refers not only to statements and promises but also to forecasts, the section must be intended to cover careless though honest forecasts because of the difficulty in proving the absence of an honest belief in a forecast. I do not think that it is permissible to construe this statute as creating the criminal offence for which the Crown contends, because of the difficulties of proof which might be involved in a contrary construction. In any event, once it is proved that the forecast is misleading, false or deceptive, and that there were no reasonable grounds for believing it, there exists powerful evidence that the accused who made the forecast for some purpose of his own either must have known it was untrue or had no reasonable belief in its truth. Often in the case of alleged fraudulent statements the only evidence of dishonesty consists of evidence that no grounds exist on which any reasonable man could have believed in the truth of the statement. In my experience, juries are not slow in a proper case to draw the inference of fraud.

For these reasons I am unable to hold that this section, which makes general provisions for the prevention of fraud, has by a sidewind created an offence entirely independent of fraud. I shall, therefore, direct the jury that the word " reckless " in this section has the same meaning as that attributed to it in the majority of the speeches in *Derry* v. *Peek* (2).

Solicitors: *Director of Public Prosecutions*; *Isadore Goldman & Son*; *B. A. Perkoff & Co.*; *P. R. Kimber*; *Sole, Sawbridge & Co.*; *Claude Hornby & Cox.*

G.F.L.B.

(1) [1931] All E.R. Rep. 179; [1932] 1 K.B. 442.
(2) (1899), 54 J.P. 148; 14 App. Cas. 337.

CHANCERY DIVISION

(VAISEY, J.)

October 23, 24, 1958

NORTH OF ENGLAND ZOOLOGICAL SOCIETY *v.* CHESTER RURAL DISTRICT COUNCIL

Rating—Relief—Organisation concerned with advancement of education—Zoological society incorporated as company limited by guarantee—Main objects charitable—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*), (2).

The society was incorporated as a company limited by guarantee and the memorandum of association, by cl. 3, stated that: "The objects of the society are: (a) To . . . take over as a going concern and conduct as a scientific and educational undertaking the business [formerly carried on by another company] . . . (b) To promote, facilitate and encourage the study of biology, zoology and animal physiology, aviculture, aquaria, ichthyology, entomology, botany and horticulture and all kindred sciences and to foster and develop among the people an interest in and knowledge of animal life. (c) To establish, equip and carry on, and develop zoological parks or gardens and living zoological collections at such places as the society shall determine. (d) To establish sanctuaries for all kinds of wild life, particularly animal and bird sanctuaries and to police in such manner and do all things necessary for the protection of all animal and plant life therein." Thereafter followed some twenty-two paragraphs, relating to various activities, set out without any distinction between main objects and ancillary objects. These provided for the holding of public meetings, publishing books, investing money, engaging orchestras, building and equipping restaurants and other buildings for the convenience of visitors, raising funds, and other matters. The society owned and managed zoological gardens of about 145 acres containing about 750 animals, birds and reptiles. Visitors, of whom there were over 500,000 annually, were charged admission fees, and about 130,000 meals, in addition to minor refreshments, were served annually to visitors, but the principal source of income was derived from admission fees. The society claimed, in respect of the premises it occupied, limitation of rates under the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), (2). The court found that the society was not established or conducted for profit.

HELD: the main objects of the society were to be found in para. (a), para. (b), para. (c) and possibly para. (d) of cl. 3, the remaining paragraphs containing powers and not objects properly so called; the main objects were charitable, or, if not charitable, were concerned with the advancement of education; and, therefore, the society was entitled to limitation of rates under s. 8 (1) (a), (2), of the Act of 1955.

ADJOURNED SUMMONS.

The plaintiffs, the North of England Zoological Society, a company limited by guarantee, who claimed to be entitled to the benefit of the provisions of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, in respect of their Zoological Gardens and premises at Upton-by-Chester, in the county of Chester, applied to the court by originating summons for the determination of the following questions: whether on the true construction of s. 8 (1) (a) of the Act of 1955, the plaintiff society was an organisation which was not established for profit and whose main objects were charitable or were otherwise concerned with the advancement of religion, education or social welfare.

The society was incorporated on May 9, 1934, under the Companies Act, 1929, as a company limited by guarantee. The memorandum of association by cl. 3 stated that:

> "The objects of the society are: (a) To acquire and take over as a going concern and conduct as a scientific and educational undertaking [the business formerly carried on, as the Chester Zoological Gardens, by a

limited company] together with or any part of the real and personal property and assets of the [former] company used in connexion with that business or belonging thereto.

" (b) To promote, facilitate, and encourage the study of biology, zoology and animal physiology, aviculture, aquaria, ichthyology, entomology, botany and horticulture and all kindred sciences and to foster and develop among the people an interest in and knowledge of animal life.

" (c) To establish, equip, and carry on, and develop zoological parks or gardens and living zoological collections at such places as the society shall determine.

" (d) To establish sanctuaries for all kinds of wild life, particularly animal and bird sanctuaries and to police in such manner and do all things necessary for the protection of all animal and plant life therein."

Then followed some twenty-two lettered paragraphs ((f) to (aa)) relating to various activities. These included: (k) To hold public meetings for the purpose of collecting contributions; (n) To publish books; (o) To borrow money and issue bonds, mortgages and debentures; (r) To invest money; (s) To engage, hire, or employ orchestras and musical performers; (v) To build and conduct for or without profit tea and dining rooms and anything which might be required for the convenience of visitors; and (w) Raising funds. All these paragraphs were set out without any distinction between main objects and ancillary objects. The society owned and managed zoological gardens of about 145 acres containing about 750 animals, birds and reptiles. The gardens were visited by over 500,000 persons annually of whom about 45,000 were school pupils who visited as part of their curriculum and admission fees were charged. About 130,000 meals were served yearly in addition to minor refreshments. There was no other catering establishment on the necessary scale within two miles and only visitors to the gardens were catered for. The capital value of the cafés and shops did not exceed, on estimate, ten per cent. of the value of the society's property, the capital value of which was estimated at about £130,000. The net surplus from the café receipts amounted to £3,400 in 1953; £1,300 in 1954; £4,200 in 1955; and £5,400 in 1956. The principal source of income was from admission fees.

Willis, Q.C., and *Coplestone-Boughey* for the ratepayers.

Squibb, Q.C., and *Widdicombe* for the Chester Rural District Council, the rating authority.

VAISEY, J.: This is a summons issued by the North of England Zoological Society as plaintiffs, against the Chester Rural District Council as defendants. The plaintiffs carry on an organisation in the neighbourhood of the City of Chester, which is commonly known as the Chester Zoo. I take those words from an advertisement, calling attention to the amenities of the plaintiffs and their organisation, in the " Chester Chronicle ", and I understand that it appeared in other local publications. The question asked is whether, on the true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), the plaintiffs are, in respect of their zoological gardens and premises at Upton-by-Chester, an organisation which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of education. Section 8 (1) applies to

" (a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of . . . education . . ."

The plaintiffs were incorporated on May 9, 1934, under the Companies Act, 1929, as a company limited by guarantee and not having a share capital. It seems to me that the only question which arises turns on what are the plaintiffs' main objects. In other words, which of its objects are main objects and which of its objects are not main objects. When I have found what the main objects are, I then have to ask myself, are those main objects charitable or not, because if they are charitable, then so far as that part of the sub-section is concerned the plaintiffs are within the ambit of s. 8.

Very often in memoranda of association one finds a clause which says that every object is to be read independently of all the other objects and to have equal force with every object, and is not to be controlled or construed by reference to any other object or to the name of the company, and is to be read in isolation as meaning exactly what it says, without any sort of qualification. No such clause is to be found in the memorandum of association of the plaintiffs. Clause 3 of the memorandum enumerates what it calls the objects, and says nothing about their being construed independently of any other objects. It simply sets them out, lettered from (a) to (aa), and if those are the objects of the plaintiffs, which I must assume they are, in order to fit the plaintiffs' position in with the section, I have to find out which of the objects are the main objects.

The expression " main objects " is nowhere defined, as far as I know. There is a fairly simple answer to this problem, because in my view there are two kinds of " objects " in this kind of document, i.e., objects which are properly so called, as distinguished from objects which are not in fact objects so much as powers. That is the point which is dealt with in *Cotman* v. *Brougham* (1), in the speech of LORD WRENBURY—than whom no greater authority on companies and the law of companies can be found—where he says:

> " There has grown up a pernicious practice of registering memoranda of association which, under the clause relating to objects, contain paragraph after paragraph not specifying or delimiting the proposed trade or purpose, but confusing power with purpose and indicating every class of act which the corporation is to have power to do."

I may perhaps mention that the same comment was made by myself some years ago in *Re Cole, Ltd.* (2). In that case I called attention to the importance of not inserting a clause, which had become so common, making every sub-clause, heading or objects clause, independent of the other objects and therefore to be construed in isolation. LORD WRENBURY's speech gives me the requisite clue to the proper significance to be attached to that phrase, " main objects ". What is meant by " main objects " in s. 8 of the Act of 1955 is, those objects which are really objects, excluding those so-called objects which are in fact nothing more or less than powers. The distinction has been drawn quite frequently, but I am quite content to base my decision on the conclusions of LORD WRENBURY in *Cotman* v. *Broughman* (1).

Looking at the memorandum of association of the plaintiffs, I find that the first object (para. (a)) is to acquire, take over and conduct as a scientific and educational undertaking the business formerly carried on as the Chester Zoological Gardens by a previous limited company. Those words seem to me to be plainly indicative of a charitable purpose. In para. (b), there is the second of the objects:

> " To promote, facilitate, and encourage the study of biology, zoology and animal physiology . . . botany and horticulture and all kindred sciences

(1) [1918] A.C. 514.
(2) [1945] 1 All E.R. 521.

and to foster and develop among the people an interest in and knowledge of animal life."

That object seems to me to be plainly charitable. Paragraph (c) is:

"To establish, equip, and carry on, and develop zoological parks or gardens and living zoological collections at such places as the society shall determine."

In my judgment, those three paragraphs give the proper objects of the plaintiffs, and I think that the other sub-clauses in the memorandum, though they are objects in a sense, are not really objects as much as powers. The rest of these enumerated activities, to use a neutral word, with the possible exception of the reference to bird sanctuaries, are not objects. I think they are ancillary powers to enable effect to be given to the main objects, which, if I may put it quite briefly, are to establish, run and carry on a zoological gardens or park.

There one can stand on firm ground. Why were the plaintiffs incorporated? To take over and to run a zoological garden and a park. That, I believe, is the answer to the question which I posed. When we come to the subsidiary objects, which I for my part regard not so much as objects as powers, we find all kinds of things enumerated, e.g., such things as holding public meetings, publishing books, investing moneys, engaging bands and orchestras, building and equipping restaurants, and other buildings for the convenience—as the clause says—of visitors to the society's undertaking, raising funds, applying to the authorities for licences, adopting a badge and so forth. All those are objects, but they are not objects for which the company was formed. I think that they are merely powers. I have some guidance from a decision of FARWELL, J., in *Re Lopes, Bence-Jones* v. *Zoological Society of London* (1), which related to a famous zoological society, the Zoological Society of London. There the headnote says:

"The objects of the Zoological Society of London as defined by its charter are 'the advancement of zoology and animal physiology and the introduction of new and curious subjects of the animal kingdom'. *Held*, that the first object was clearly educational and the second object, being on construction merely in aid of the first, was also educational and (semble) it was educational in itself. The society was therefore an educational charity, although in carrying out its objects it was found necessary to provide its pupils with food and amusement. *Held*, also, that the second object necessitated and involved the upkeep and improvement of zoological gardens."

I do not want anyone to suppose that I am holding that anything which calls itself a zoo or zoological gardens is necessarily charitable, and that it necessarily comes within the authority of *Re Lopes* (1). I can imagine all kinds of cases where the presence of animals in an enclosed park or grounds is merely colourable, but I see no ground whatever for differentiating the present case, the case of the Chester zoo, from the case of the London zoo on which FARWELL, J., gave his decision in *Re Lopes* (1). There the charter was very simple. Only two objects were mentioned, the first the main object, the second ancillary, and FARWELL, J., held as an alternative that the second was also a charitable, educational activity. I have been furnished by counsel with the present powers and bye-laws of the London zoo. There has been a supplemental charter in that case, and the charter which FARWELL, J., had before him is set out in the printed document which is now before me, but it does not throw any further light on the matter than what I can derive from the report itself.

(1) [1931] 2 Ch. 130.

The question has been raised whether this is a profit-making organisation in spite of the protestation against the making of profit which is to be found in its memorandum, but I am not convinced about that. I think that there was no question of profit here, and that the making of profit does not really enter into this matter at all. Counsel for the defendants argued that there was a serious point there, but he did not elaborate it to any great extent. He referred me to *Brighton College* v. *Marriott* (1). I do not propose to go into that part of the argument, because counsel did not put it forward as the main point in his case, and indeed I do not think that it really arises, although if this case is carried to a higher court he could advance there an argument based on the question of profit or no profit. I need say no more about it.

The cases to which I have been referred on s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, are *Berry* v. *St. Marylebone Corpn.* (2) and *National Deposit Friendly Society (Trustees)* v. *Skegness U.D.C.* (3), which was a decision of the House of Lords. Each of those cases shows that I have to find that all the main objects are charitable, not merely some or one of them, and I have come to the conclusion that the main objects, which I have identified as being those in para. (a), para. (b), para. (c) and possibly para. (d) of cl. 3 of the memorandum, are charitable, and that they together constitute what the section refers to as the main objects of the plaintiffs.

I come to the conclusion on the evidence that the main objects for which the plaintiffs were established were all of them charitable, which seems to me to conclude in their favour their claim to come within s. 8 (1) (a). I need not, therefore, decide whether those objects are otherwise concerned with the advancement of education, but, even if they were not charitable, I think that they have certainly been concerned with the advancement of education. In consequence I have come to the conclusion that the plaintiffs are within the purview of the sub-section.

Order accordingly.

Solicitors: *Field, Roscoe & Co.*, for *Ouseley-Smith & Co.*, Chester; *Preston, Lane Claypon & O'Kelly*, for *Gamon & Co.*, Chester.

R.D.H.O.

(1) [1926] A.C. 192.
(2) [1957] 3 All E.R. 677; [1958] Ch. 406.
(3) 122 J.P. 399; [1958] 2 All E.R. 601.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., STREATFEILD and DIPLOCK, JJ.)

October 27, 1958

R. *v.* LLOYD-JONES AND ANOTHER. *Ex parte* THOMAS

Criminal Law—Quarter sessions—Bench warrant—Committal for sentence—Admission to bail pending appeal against conviction by magistrates—Failure to appear—Power to issue warrant—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 29 (3) (*a*)—*Magistrates' Courts Act*, 1952 (15 & 16 *Geo.* 6 *and* 1 *Eliz.* 2, *c.* 55), *s.* 29.

By virtue of s. 29 (3) (a) of the Criminal Justice Act, 1948, which provides that on a committal for sentence quarter sessions shall be placed in the same position as if the offender had just been convicted before them on indictment, quarter sessions have power to issue a bench warrant where an offender, who has been committed to them for sentence under s. 29 of the Magistrates Courts Act, 1952, and admitted to bail pending appeal against his conviction by the magistrates' court, fails to surrender to his bail.

APPLICATION for mandamus.

On April 18, 1958, John Charles Platt was convicted at Cardiff City Magistrates' Court on three charges of larceny, and was committed for sentence to the next quarter sessions for the city of Cardiff under the provisions of s. 29 of the Magistrates' Courts Act, 1952. He then gave notice of his intention to appeal against conviction, and in June he was granted bail by Ashworth, J., in London conditional on his reporting daily to the police. On August 14, 1958, his appeal came on before quarter sessions. He did not appear or surrender to his bail and in due course the appeal was dismissed. The assistant recorder was asked to issue a bench warrant for the prisoner's arrest, but he felt that in all the circumstances he had no power to do so. The chief constable of Cardiff, William Francis Thomas, obtained leave to apply for an order of mandamus directed to the recorder, H. V. Lloyd-Jones, Esq., Q.C., and the assistant recorder, F. Elwyn Jones, Esq., Q.C., requiring the issue of a bench warrant.

J. F. E. Stephenson for the applicant.
The respondents did not appear.

LORD PARKER, C.J.: On Apr. 18, 1958, Platt was convicted before the magistrates' court on three charges of larceny, and he was committed to the next quarter sessions for the City of Cardiff for sentence under s. 29. The prisoner then gave notice of his intention to appeal against conviction, and in June he was granted bail by ASHWORTH, J., in London, conditional on his reporting daily to the police, bail being in his own recognisance in the sum of £20. On Aug. 14, 1958, his appeal came on before quarter sessions, but he did not appear or surrender to his bail and in due course his appeal was dismissed by the assistant recorder. Thereupon it became the duty of the assistant recorder to consider the question of sentence. He was asked to issue a bench warrant for the prisoner's arrest, and, though one does not blame him in the slightest, he decided that in all the circumstances he had no power to do so. The applicant then came before the judge in chambers in London who said that he did not think that he had power to issue the warrant and, in those circumstances, the matter has come before this court.

It seems clear that somebody ought to have power to issue a bench warrant and, especially, the person seised of the matter before whose court the case has come, namely, the recorder of the city of Cardiff, but the question is whether he

has. For myself, I do not at the moment see why any court seised of a matter should not have power to issue a warrant in circumstances such as these, where a prisoner fails to surrender to his bail. One would think that the position was that every court would have inherent power to do so, but, as far as I can see, the matter has not proceeded quite on those lines, for if one looks at ARCHBOLD'S CRIMINAL PLEADING AND PRACTICE (33rd ed.), p. 71, it would appear that it has been the practice

> "that any court of record before which an indictment is preferred and signed may forthwith issue a bench warrant . . . Where a party against whom the indictment has been preferred and signed is already under recognisance to appear and answer any indictment that may be preferred against him, and he does not appear, the prosecutor may bespeak a bench warrant, which will be signed by the justices at the close of the sessions."

The form of bench warrant set out at p. 72 of ARCHBOLD, calls on "A.B., who stands indicted before us . . . to answer the said indictment". In regard to magistrates' courts there was doubt, apparently, for a considerable time whether magistrates had power to issue a warrant, and indeed by s. 67 of the Criminal Justice Act, 1948, they were given express power to do so, that enactment being now replaced by s. 97 of the Magistrates' Courts Act, 1952. Still, whatever the position may be with regard to inherent powers, in my judgment there is sufficient ground to be found in the Criminal Justice Act, 1948, itself to say that the recorder in such circumstances has power. Sub-section (3) of s. 29 of the Act of 1948 provides:

> "Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say:—(a) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment."

It is clear from that that when quarter sessions begin to inquire into the matter with a view to dealing with the offender they are put in the same position as if the offender had just been convicted before them on indictment. Indeed, in the two cases to which we have been referred, *R.* v. *Browes* (1), and *R.* v. *Grant* (2), the Court of Criminal Appeal said that where sub-s. (3) (a) speaks of the prisoner being treated as if he had just been convicted on indictment, that would be so for the purposes of making an order under s. 22 (1) of the Act of 1948 for supervision, which can only be made on indictment, and also for the purposes of the service of notices under s. 23 of the Act of 1948, which provides that the notice must be served at least three days before the trial. Moreover the court held that three days before the trial in circumstances such as these meant three days before the hearing at which quarter sessions would be dealing with the matter as if they had just convicted on indictment, as if they had just tried the person. Finally, it is to be observed that by sub-s. (6) of s. 21 of the Act of 1948 a person who has been convicted of a summary offence and then sentenced by a court of quarter sessions is to be treated as if he had been convicted of that offence on trial on indictment. For my part, I think that that is enough to enable us to say that in a case such as this the recorder had power to issue a bench warrant. Looking at the matter in this way—that the recorder is to be treated as if he has just tried the prisoner and as if the prisoner had been convicted on indictment—it would follow that

(1) 113 J.P. 454; [1949] 2 All E.R. 449.
(2) 115 J.P. 36; [1951] 1 All E.R. 28; [1951] 1 K.B. 500.

if, after the midday adjourment, the prisoner had absconded, the recorder, before sentencing him, could on these very words have him brought up on a bench warrant. I think myself that the recorder had power to issue a bench warrant and that the order of mandamus should issue.

STREATFEILD, J.: I agree.

DIPLOCK, J.: I agree.

[**LORD PARKER, C.J.,** then directed that mandamus should issue to the recorder, not to the assistant recorder, and indicated that reference to the prisoner " standing indicted " which appeared in the usual form both of an order for mandamus and of a bench warrant, could be suitably corrected to fit the purposes of the present case.]

Order for mandamus.

Solicitors: *Theodore Goddard & Co.*, for *Town Clerk*, Cardiff.

T.R.F.B.

CHANCERY DIVISION

(ROXBURGH, J.)

October 23, 24, 27, 28, 29, 1958

FAWCETT PROPERTIES, LTD. *v.* BUCKINGHAM COUNTY COUNCIL

Town and Country Planning—Development—Conditional permission to erect farmworker's cottages—Occupation of cottages limited to persons defined by nature of employment, including their dependants—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 14 (1).

The plaintiffs were the owners of two cottages erected on a site in the Metropolitan Green Belt area in respect of which the defendant council was the local planning authority. In response to an application, dated November 22, 1952, under the Town and Country Planning Act, 1947, by the former owner of the site, the council in a document dated December 5, 1952, gave permission for the erection of a pair of farmworker's cottages on the site subject to the following condition, which they purported to impose under s. 14 (1) of the Act: " The occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid." The reason for imposing the condition was stated in the document to be because the council would not be prepared to permit the erection of dwelling houses on this site unconnected with the use of the adjoining land for agriculture or similar purposes. At that date there was no development plan for the area which had been approved by the Minister. The council's permission was registered as a local land charge in the register of town planning prohibition or restrictions, the former site owner erected the two cottages, and thereafter they were occupied by persons whose employment came within the terms of the condition. On December 31, 1956, the plaintiffs became owners in fee simple of the two cottages and were now anxious that the cottages should be occupied by persons whose employment did not come within the terms of the condition, but the council maintained that such occupation would constitute a breach of town and country planning law and would render the plaintiffs liable to enforcement proceedings. In an action against the council, the plaintiffs claimed a declaration that the condition was ultra vires and of no effect.

HELD: the condition which the council sought to impose under s. 14 (1) of the Act of 1947 was not one which fairly and reasonably related to the permitted development, and, though imposed bona fide, was a mistake in the exercise of the council's statutory powers and was ultra vires and void, and, therefore, the court was entitled to make the declaration claimed.

ACTION.

The plaintiffs were the present owners in fee simple of a pair of semi-detached cottages known as Penwyn Cottages (hereinafter referred to as "the cottages") situated off Dibden Hill Lane, Chalfont St. Giles in the county of Buckingham and on land situated in the metropolitan green belt. The defendants, Buckingham County Council, were the planning authority under the Town and Country Planning Act, 1947, for the area.

Donald Decimus Clark was the plaintiffs' predecessor in title, and in response to an application under the Town and Country Planning Act, 1947, by him dated Nov. 22, 1952, the defendants through the clerk of the rural district council issued a document dated Dec. 5, 1952, whereby they, as local planning authority, gave permission for the erection of a pair of farm worker's cottages (viz., the cottages mentioned above) subject to the condition that

> "The occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid."

The reason for imposing the condition was stated to be

> "Because the council would not be prepared to permit the erection of dwelling-houses on this site unconnected with the use of the adjoining land for agriculture or similar purposes."

At this date there was no development plan. The condition was registered as a local land charge in the register of town planning prohibitions or restrictions. The cottages were erected on the site and after erection were first occupied for a substantial period by persons whose employment was covered by the terms of the condition.

On Dec. 31, 1956, the fee simple in the cottages was conveyed to the plaintiffs. The plaintiffs were anxious to place in occupation of the cottages persons whose employment was not covered by the terms of the condition, but the defendants maintained that this would constitute a breach of the law relating to town and country planning and would render the plaintiffs liable to enforcement proceedings. The plaintiffs contended that the condition was ultra vires the power of the defendants and void, and sought a declaration to that effect.

Megarry, Q.C., and *Fletcher-Cooke, Q.C.*, for the plaintiffs.
Widgery, Q.C., and *Alan Fletcher* for the defendants.

ROXBURGH, J.: This case raises difficult and complicated questions under the Town and Country Planning Act, 1947, which I shall hereafter call "the Act". It has been necessary to canvass an even greater number of difficult and important questions which in the result I have managed to evade for the time being, but I could not have reached a decision at all without going into those matters and, accordingly, I must formally express my gratitude to counsel on both sides for the great assistance they have given me (and in fact I might fairly and seriously say the tuition they have given me) in this legislation. Though my judgment will be fairly short it does not mean that I have thought the questions easy of resolution.

On Dec. 5, 1952, in response to an application by the predecessor in title of the plaintiffs, the defendants, through the clerk of the Amersham Rural District Council, issued a document in pursuance of their powers under the Town and Country Planning Act, 1947, and the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728). [HIS LORDSHIP read the document

dated Dec. 5, 1952, which is set out above, and continued:] Section 36 of the Act provides:

> " Where, under the foregoing provisions of this Part of this Act, a local planning authority are required to have regard to the provisions of the development plan in relation to the exercise of any of their functions, then, in relation to the exercise of those functions during any period before such a plan has become operative with respect to the area of that authority, that authority shall have regard to any directions which may be given to them by the Minister as to the provisions to be included in such a plan, and subject to any such directions shall have regard to the provisions which in their opinion will be required to be so included for securing the proper planning of the said area."

At the material date, Dec. 5, 1952, there was no such plan and as far as I am aware the Minister had given no direction and accordingly they had to

> " have regard to the provisions which in their opinion will be required to be so included [in the plan] for securing the proper planning of the said area."

I draw attention to those words in passing " securing the proper planning of the said area ", because, although they may not be directly relevant, they are entirely consistent with the view which I have of the scope of the powers of a local planning authority.

Their powers in regard to the matter of granting permission are to be found mainly, if not exclusively, in s. 14. I do not find it necessary to discuss the ambit of s. 18 (3) which provides:

> " Where permission is granted under this Part of this Act for the erection of a building, the grant of permission may specify the purposes for which the building may be used; and if no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed."

It is unnecessary, and it would be dangerous for me, in view of the serious problems involved, to discuss the meaning of that sub-section, because on the view that I take of the true construction of the Act this condition would be void, for reasons which I shall give, whether the condition purports to have been made under s. 18 (under which I do not think that it was ever intended to be made) or whether it was made under s. 14, which seems to me (and in this respect I cannot accept the whole of the argument of counsel for the plaintiffs) to enable a proper condition to be imposed to achieve the purpose which I have no doubt that the defendants had in mind. I say at once, however, in order to avoid any danger of misunderstanding, that there is no suggestion whatever of bad faith in this case.

Section 14 provides:

> " (1) Subject to the provisions of this and the next following section, where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations.
>
> " (2) Without prejudice to the generality of the foregoing sub-section, conditions may be imposed on the grant of permission to develop land thereunder . . . "

Then follow two categories, (a) and (b). Section 36 provides for a case in which no development plan has become operative.

That there is some limitation on the words "such conditions as they think fit" is plain on authority binding on me. I am not prepared, however, to accept the limitation which counsel for the plaintiffs sought to place on the local planning authority. He submitted that they were entitled to make it a condition that the permitted development, which was a dwelling-house, should be used for residential or industrial or other general purposes. He said, to use his exact phrase, that it was possible for them to impose a condition that the building that was being permitted should be used as a dwelling-house or as an industrial establishment or similar class of definition, but that it was not permissible to prescribe categories of persons by whom alone the building could be used as a dwelling-house. It is contrary to my instinct to write glosses into an Act of Parliament unless either that has been done by authority already binding on me, or there is a context to be found in the Act when read as a whole which makes it logically impossible to believe that Parliament intended the language used by it to be applied with all the generalities which it appears to possess. If the language which Parliament has used is clear and if there is no context to control it, then in my view, if it leads to unexpected consequences, Parliament is the body to reform the provision and not any of us. I do not find anywhere in the Act anything which to me seems a sufficient reason for reframing the language of Parliament in the manner suggested by counsel.

That is by no means the end of the case. Although there was no development plan at the material date, I am quite prepared to believe that the defendants when minded to consider what provisions would be required to be included in the development plan for securing the proper planning of the said area were entitled to envisage that the site in question might, when there was a development plan in due course, be found to be included in a green belt area, using that term more popularly than legally. I think that the defendants had an intention to preserve this site as a rural area, and that it was bona fide and in fact a proper performance of their duties. That being so, I think that some condition, designed to keep these cottages available for agricultural workers so long as they were required for the housing of agricultural workers, would have been entirely consistent with proper planning and I do not say that such a condition may not extend further than I have just mentioned. That may be to some extent an obiter dictum, but I think that it was necessary for me to say it in order to explain how I reach my conclusion to which I shall come. All that I have said is that some condition for the general purpose of securing these cottages for agricultural workers, so long as there were any who wished to inhabit the cottages, would, in my opinion have been a proper exercise of power under this Act. I do not say, on the other hand, that the restriction could have been as narrow as the reason given in the document of Dec. 5, 1952, which I have read, because no attempt to impose such a condition was made. The reason has to be stated, but what the exact effect of stating the reason is has not been decided and need not now be decided.

It seems to me that whereas the words in s. 14 (1) of the Act are "subject to such conditions as they think fit", they must be such conditions as they think fit having regard to the statutory duties with which they are entrusted. I think that limitation must apply to all persons whose rights and duties are the creation of the statute. What they are entrusted with is local planning and it is not for no purpose that in the very section which I have to construe they are called the local planning authority. Again, not without significance, in s. 36, though it does not directly apply, there is a reference to the "proper planning of the said area" and there are indeed many other similar phrases which I might pray in aid

scattered about the Act. I am prepared to place one gloss on this statute because it is hallowed by authority and that is that however general the words " such conditions as they think fit " may be, they must be such conditions as they think fit having regard to local planning considerations. It seems to me that that is inevitably so, and I might add that in my view when the section refers to " any other material considerations " it means any other consideration material to the development in connexion with local planning. Therefore I consider that the question which I have to solve is whether this condition can possibly be one which could have been imposed solely with regard to local planning considerations.

There is an authority which binds me to say that. It is the authority of the Court of Appeal in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (1). LORD DENNING, after referring to the condition there in question, which I may say bore no resemblance to the condition in the present case, says:

> " The Minister claims to impose these conditions under the general power contained in s. 14 (1), or alternatively under the special power contained in s. 14 (2) (a)."

There was some point in referring to s. 14 (2) (a) in that case, because it does look very much like one of the cases specifically referred to in s. 14 (2) (a), but as s. 14 (2) (a) is without prejudice to the generality of s. 14 (1), I prefer to deal only with s. 14 (1), which I think is more likely to cover the present case than s. 14 (2) (a); though it makes no difference which it is in my view. LORD DENNING continues:

> " The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose ' such conditions as they think fit ' [a reference to s. 14 (1)], nevertheless the law says that those conditions [the conditions which they seek to impose under s. 14 (1)], to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

As LORD DENNING in effect points out in the next sentence, the word " ulterior " is not to bear any sinister meaning and that is the reason why I prefer the Chancery phrase, drawn from company law, " collateral purpose ": there is no suggestion of naughtiness in " collateral ". That passage in LORD DENNING's judgment is binding on me. It was approved by HODSON, L.J., and tentatively approved by MORRIS, L.J.; I say " tentatively " because in his view that matter did not really arise.

In the event, I have been absolved from the obligation of deciding what will be the consequence of the judgment which I am in process of delivering and the only person, so far as I know, who has embarked on that problem is HODSON, L.J. He has used some very far-reaching language in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (1). He says:

> " In any event it would, I think, be impossible to mutilate the Minister's decision by removing one or more of the conditions. The permission given has been given subject to those conditions, and non constat but that no permission would have been given at all if the conditions had not been attached. The consequence would be that if any of the conditions imposed were held to be bad as imposed without jurisdiction, the whole planning permission would fall with it, and the company would be left without any planning permission at all, for it would not be open to the court to leave the planning permission standing shorn of its conditions, or any of them."

(1) 122 J.P. 182; [1958] 1 All E.R. 625; [1958] 1 Q.B. 554.

So that if there were twenty varied conditions attached to the permission to erect the house, and the house had been erected and yet one of them, however trivial, was ultra vires, there would be no planning permission for the erection of that house. That is a very far-reaching obiter dictum and I am glad that I have been absolved from the duty of considering whether it is well founded.

Counsel for the plaintiffs has submitted that many of the elements of this condition are void for uncertainty. With some difficulty I persuaded him that it did not matter whether they were void for uncertainty until some other court was prepared to decide that they were intra vires; but I owe it to his able argument, which did in fact raise a prima facie case of uncertainty in connexion with one of them, to say that he argued it very fully and it is a point open to him if some other court should think that this condition is intra vires. The phrase that gives me most worry in that connexion is "an industry mainly dependent upon agriculture".

There are some things which seem to be so irrelevant to town planning that they should be so regarded unless somebody is prepared to give some reason, whether that reason be given by the representative of the town planning authority or arguendo by counsel. In spite of the extremely able argument put before me by counsel for the defendants, he was unable to give any reason for some of these restrictions. His broad proposition about them was that if there was a town and country planning element in it I should disregard the things that had no town and country planning elements. I can believe some such argument could be acceptable if the irrelevant matter bore small proportion to the relevant matter, but where the irrelevant matter is pari passu with or in excess of the relevant matter, that is an argument which does not appeal to me. It would be difficult to upset a properly framed condition giving priority in respect of the occupation of these houses to the agricultural workers in this district. That is the first time I have mentioned the phrase "in this district", but it might have been implied except for the words which I shall mention, because it would be difficult for an agricultural worker to live in this house and work in some other district; but owing to the wide extent of this clause that ceases to be true. It covers as the primary category of potential occupants persons whose employment is or was agricultural. That would cover agricultural workers, whether their work was in the district, in the British Empire, in the British Commonwealth or anywhere in the world, who had altogether retired from employment. That is the leading category and I am quite unable to see, and nobody has suggested, how any local planning purpose could be served by giving priority to persons who were in retirement and who perhaps had never been in the district in their lives before. Counsel for the defendants developed an argument on these lines. The avowed purpose of the defendants, as stated in the reasons, might be too narrow. I do not say that it is, but I see that it might be, and therefore, he says any extension in the interest of the landowner cannot be ultra vires. After all, he need not take advantage of it. We might have tied him up, so the argument goes, much more stringently; but that will not do, in my judgment. Persons entrusted with a statutory duty have to perform their duty in a manner which is fair, not only to the landlord but to all other classes in the community who may be concerned.

The effect of this limitation is that supposing that there were two applicants for this cottage, one of whom was working in Chalfont St. Giles in an industry which did not fall within the range of the permitted industries and the other a retired farm worker who had never been in England before, apparently the landlord would be bound to choose the retired farm worker who had never been in England before. That in my judgment is grossly unfair to the non-agricultural resident in

Chalfont St. Giles and is an unfairness which no town and country planning official could possibly justify and nobody sought to do so. The matter does not end there.

There is a second major category, " the dependants of such persons as aforesaid ". It was argued that " dependants " is void for uncertainty. I do not think as at present advised that that phrase is void for uncertainty, though it is extremely ambiguous and one that it is not fair to put into a condition of this sort; but however I construe it, what possible town and country planning purpose could be alleged for giving priority to dependants of persons engaged in agriculture unless there was somebody also residing in the house who was in fact engaged in agriculture or unless (and this might be a perfectly fair limitation) the dependant were the widow of a man who had been engaged in agricultural work while living in the house. That might be a fair limitation. I do not decide whether it is or not, but one can see the town and country planning purpose behind a restriction of that sort. This condition, however, is not limited, as far as I can see, in that way at all. Anybody who can say he was depending on such persons as aforesaid would take precedence as a new tenant over anybody who could not allege that he came within the category. I can see no town and country planning purpose in that and it also seems to me that it is very unfair on persons now residing in Chalfont St. Giles who are not engaged in any of the permitted occupations.

Thirdly, even if the phrase " an industry mainly dependent on agriculture " is not void for uncertainty, I should have thought that it was a wholly unreasonable clause to put into a condition of this sort which, it is to be observed, is in relation to farm workers' cottages. If it is capable of construction, the research necessary to ascertain who was qualified would be expensive and extensive. I do not know what it means; it might mean all sorts of different things; but if it can be construed (and for this comment I am assuming, without deciding, that it can be construed) the first thing would be to get it construed and the next thing would be a very expensive and extensive inquiry as to what industries fell within the condition as so construed. To put a thing like that into a permission for the erection of farm workers' cottages, if it does relate to town planning, would be grossly unfair. Moreover I am not able to see how any town planning purpose can be as wide as that. I suppose nobody would deny that, for instance, the extraction of sugar from beet was an industry mainly dependent on agriculture. Whatever the words may mean, that is not a borderline case. I cannot see what possible town planning purpose there could be in giving priority, in a proposed green belt area, to persons engaged in the beet sugar industry. Whether that phrase is void for uncertainty or not, it is almost impossible to imagine any town planning purpose to which it is to be related, and if it can be so related it is, in my judgment, grossly unfair to expect the landlord and his potential tenants of this cottage to trouble over a problem of that complexity and magnitude.

I have arrived, therefore, at the conclusion that this clause is ultra vires as not fairly and reasonably relating to any local planning considerations. I observe that I am using words slightly different from those used by LORD DENNING in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (1). I have intended to put it in that way because the point which arises in this case is not quite the same and he might have put it slightly differently if he had been dealing with this particular case, but I do not think that there is any real difference between what he said and what I am now saying.

(1) 122 J.P. 182; [1958] 1 All E.R. 625; [1958] 1 Q.B. 554.

I have already said that I entirely absolve the council from any ulterior object in the sense of improper object and I am not in a position to say whether in truth this was inserted for some collateral purpose or whether it is a case of a blunder. If it is not for some planning purpose it does not matter whether it is for some collateral purpose or simply because of a blunder. I am disposed to think that "blunder" is the true explanation and I say that because of the complete difficulty of reconciling the reason with the clause. It may be that the reason given was too narrow to be justified in a clause; but any competent draftsman could have thought of a hundred variations of that reason which would have been very difficult to attack. If it is a blunder it cannot be something which was really done in exercise of statutory powers. LORD DENNING said in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (1):

> "If they mistake or misuse their powers, however bona fide, the court can interfere by declaration and injunction."

This is a blunder or a mistake where, in my judgment, I ought to make a declaration that the condition is and was ultra vires and of no effect. I order the rectification of the local land charge by deleting the entry which was made on Dec. 5, 1952.

Judgment for the plaintiffs.

Solicitors: *A. L. Philips & Co.*; *Sharpe, Pritchard & Co.*, for *Clerk to Buckingham County Council.*

R.D.H.O.

(1) 122 J.P. 182; [1958] 1 All E.R. 625; [1958] 1 Q.B. 554.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., STREATFEILD AND DIPLOCK, JJ.)

October 23, 1958

B. *v.* R.

Criminal Law—Presumption of innocence—Child between eight and fourteen—Evidence sufficient to rebut.

A boy just under nine years old was charged at a juvenile court with housebreaking and larceny. Evidence was given before the justices, and subsequently on appeal at quarter sessions, that the boy came of a respectable family, had been properly brought up, and, apart from the matter before the court, was well-behaved.

HELD: that the evidence was sufficient to rebut the presumption of innocence which arose by reason of his age, and that the justices and quarter sessions were entitled to find that there was sufficient evidence of a guilty state of mind to justify a finding of guilt.

CASE STATED by Caernarvonshire Quarter Sessions.

The defendant, a boy of nearly nine years old, was found Guilty by the Portmadoc juvenile court on Jan. 30, 1958, of breaking and entering a dwelling-house on Oct. 25, 1957, and stealing therefrom a powder compact, two £1 notes, eight pounds of apples, four tins of grapefruit, one tin of blackcurrants, one tin of beer, and a bracelet. The Juvenile Court placed him on probation for one year on payment of costs. The defendant appealed to Caernarvonshire Quarter Sessions, where it was established that, when interviewed by the police in the presence of his mother, the defendant made a statement in which he said that he first went to the house with a cousin on a "bob-a-job" visit. They knocked at the door, but there was no reply. Having knocked on the

back door and seen that there was nobody there, his cousin went to the window by the door. He lifted his cousin up on the window sill and his cousin pulled down the window and went in saying: "I'm going in to see what's there." His cousin then went in and opened the back door and let him in. They were both frightened and left by the back door. His cousin took the key with him. The following afternoon the defendant went with his cousin and three other boys to the house, opening the back door with the key. There was evidence that the boy came of a respectable family, had been properly brought up, and apart from the present matter, was well behaved. Quarter sessions held that the evidence was sufficient to rebut the presumption of innocence which arose by reason of the defendant's age and dismissed the appeal. The defendant appealed to the Divisional Court.

Peter J. I. Thomas for the appellant, the defendant.
W. T. Williams for the respondent, the prosecutor.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of the Caernarvonshire Appeal Committee dismissing an appeal by the appellant from the Portmadoc Juvenile Court which had found the appellant guilty of two housebreakings and stealing, both in the same house.

The appellant is a boy who was at the time of these alleged offences one day under nine years old, and the point of the appeal to quarter sessions and to this court is that with a boy of that age the court must be satisfied that he really did have a guilty mind, and that on the facts of this case the juvenile court and the appeal committee were wrong in finding that he so had. On Oct. 25, 1957, the appellant went with his cousin, R., aged eleven, to a house occupied by a Mrs. W., who was away. They were apparently on what is called "a bob-a-job round" and they called at this house. They got no answer at the front door. They went round to the back and saw some washing hanging out, which made them think that somebody was there, so they knocked on the back door, and, there being no answer, R. asked the appellant to look and see if there was a window open. Then the Case finds: "R. went to the next window by the door which was up but not locked. The appellant lifted R. up on the window sill and he pulled down the window and went in saying: 'I'm going in to see what's there'." He then let the appellant in through the back door, and they looked about the house. Rather significantly, the appellant in his statement said: "We were both frightened and left by the back door", but be it observed that they took away the key and later returned with other boys and as a result of that visit it was found, on Oct. 27, that the house was in complete chaos. Drawers had been broken open and the articles scattered, fruit juice in tins opened, apples taken, and, in particular, a gold bracelet was taken and £2 in notes and sundry other effects. The appellant was interviewed by the police in the presence of his mother and made a very frank statement of all that happened which is, broadly speaking, all that I have set out.

There is no doubt in the case of a child between the age of eight and fourteen that there is a presumption that the child is not in possession of that knowledge of which mens rea is an essential ingredient, and it is to be observed that, the lower the child is in the scale between eight and fourteen, the stronger the evidence necessary to rebut that presumption, because in the case of a child under eight it is conclusively presumed he is incapable of committing crime. It has often been put in this way, that in order to rebut the presumption "guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt", or, as it has also been put, "there must be strong and pregnant evidence that he understood what he did". The

appeal committee were pressed with all these considerations, and, to my mind, it is clear that they brought their minds to bear on this very point. If that be so, counsel is bound to argue that there was here no evidence of a character which would entitle magistrates to say that the presumption was rebutted. It may be that the case was rather " thin ", but I cannot say that there was no evidence on which the magistrates could say that the presumption was rebutted. Indeed, there are features which point quite strongly that way. Here is a child who has had apparently every opportunity in life, coming from a respectable family and properly brought up, who, one would think, would know in the ordinary sense the difference between good and evil and what he should do and what he should not do. Here he is taking part, first, in the testing of the house at the back and front, climbing through the window, and on leaving taking the key and returning later with a gang, completely wrecking the house and taking certain articles. For my part, I cannot say there was no evidence on which the magistrates could come to the conclusion that this boy had guilty knowledge, and I would dismiss this appeal.

STREATFEILD, J.: I agree. I think the magistrates here applied their minds to the correct principle of law, and upon the facts, as it seems to me, there was evidence, albeit it may have been a little thin, but the strength of which was for the magistrates to judge, upon which they could come to the conclusion, as they did, that the common law presumption against a mischievous intention was in fact rebutted. In my view, there was material which justified the magistrates' finding.

DIPLOCK, J.: I agree, without expressing any view whether I should myself have come to the same conclusion as the magistrates.

Appeal dismissed.

Solicitors: *Hall, Clark & Goldhawk*, for *Gwyndaf-Williams & Roberts*, Portmadoc; *Whitfield, Byrne & Dean*, for *Carter, Vincent & Co.*, Caernarvon.

T.R.F.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P.)

October 29, 1958

EWART *v.* EWART

Husband and Wife—Maintenance—Agreement—Variation by court—Jurisdiction—Permanent or continuing financial provisions, but agreement not made for the purposes of living separately—Maintenance Agreements Act, 1957 (*5 & 6 Eliz. 2, c. 35*), *s.* 1 (1), (3).

The parties were married in 1931, and in 1953 the wife discovered that the husband had been carrying on an adulterous association with another woman. A reconciliation at the husband's instance was agreed on terms which included financial arrangements, and these were subsequently incorporated in a deed dated May 1, 1954. The deed did not provide either for the resumption of cohabitation or for separation, but it included covenants by the husband to make payments during the joint lives of himself and the wife and to leave her property by his will. The parties resumed cohabitation and lived together until August, 1956, when the husband left the matrimonial home. He now applied to the court to vary the financial arrangements made by the deed, alleging that under the Maintenance Agreements Act, 1957, s. 1, which by sub-s. (1) applied to any agreement in writing between the parties to a marriage " for the purposes of their living separately ", there was jurisdiction under sub-s. (3) to vary the deed.

HELD: the court had no jurisdiction under s. 1 of the Maintenance Agreements Act, 1957, to vary the deed since, notwithstanding the continuance or permanence of the financial provisions made by it, it had not in fact been made for the purposes of the parties living separately within the meaning of s. 1 (1).

ORIGINATING SUMMONS.

This was a husband's application under the Maintenance Agreements Act, 1957, s. 1 (1) (a), claiming that an agreement made by deed between himself and the wife on May 1, 1954, containing financial arrangements should be altered so as to make different financial arrangements. The hearing took place in chambers but the summons was adjourned into open court for judgment.

J. Jackson for the husband.
K. B. Campbell for the wife.

Cur. adv. vult.

Oct. 29. **LORD MERRIMAN, P.,** read the following judgment: At the first hearing on affidavit evidence each counsel claimed the right to cross-examine the other deponent, and counsel agreed, and indeed insisted, that in the absence of any express declaration on the face of the deed it was necessary to go into the circumstances in which the deed itself was made in order to ascertain whether or no the agreement was made " for the purposes of [the parties] living separately ", so as to bring it within the scope of the Maintenance Agreements Act, 1957. The originating summons was heard in chambers throughout; but as this was said to be the first case under the Maintenance Agreements Act, 1957, and to raise a question of jurisdiction, I have adjourned the giving of my judgment into open court.

The husband puts forward certain alleged changes in the circumstances, in the light of which the original agreement was made. But the wife asserts that the provisions of the deed in question do not come within the Act at all, and it is to this point that the evidence and the arguments have been directed—for, unless the Act of 1957 applies, it is common ground that I have no jurisdiction, in the circumstances of this case, to reform the terms of this particular deed; and, therefore, there is no object in considering the alleged change of circumstances unless the court is satisfied that the Act applies. It is now common ground that the agreement is not in form a separation agreement, but it is the husband's contention that its terms are consistent with its being designed to govern a separation, and do so by necessary implication.

The circumstances leading up to the deed may be outlined as follows: The parties were married on Aug. 28, 1931. About the end of November or early December, 1953, the husband had an illness. When he was lying in bed at the matrimonial home the wife accidentally intercepted a telephone conversation between the husband and a woman with whom, admittedly without the wife's knowledge, he had been committing adultery for some five years, and who had recently had a child of which he was the father. After a futile attempt by the husband to pretend that the conversation related to some man other than himself, he was forced to admit this association, which was plainly a very great shock to the wife. She consulted her solicitors, and there is no doubt that she contemplated divorce proceedings. It happened that the husband had just obtained new employment, which he thought would be jeopardised by the scandal of divorce proceedings, and I find as a fact, as is now admitted by his counsel, that he begged to be forgiven, and was fully cognisant of the outline of the terms on which the reconciliation should be effected.

This view of the matter is supported by a letter from the husband's then solicitors to the wife's solicitors, dated Dec. 21, 1953, in which they say that it is

unnecessary for them to send the return of the husband's income for the year 1952-53 because they have heard from him that his wife has agreed to resume married life with him on certain terms which are set out in the letter. It is unnecessary to quote them from the letter as the final version of the terms is comprised in the deed itself.

The deed is made between the husband of the first part, the wife of the second part, and two trustees for the wife, who were in fact members of her solicitor's firm. It describes both the husband and the wife as being of Astrope Folly, Puttenham, near Tring in the county of Hertford. This was a house that had been built for them about 1948, in which they had lived together until the discovery of the husband's association already mentioned. The letter referred to stipulated that the house and the adjacent land should be transferred to the wife, and that the contents should be likewise transferred. The deed recites a conveyance of the freehold land and premises known as Astrope Folly by deed of Feb. 18, 1954, to the wife in fee simple for her own use and benefit absolutely, subject only as therein mentioned. It is only necessary to mention that this reservation refers to an equitable mortgage by deposit of the title deeds for the sum of £3,000 due to the husband and his sister as the trustees of the trust created by their father's will. The deed also recites that on the same day the husband delivered to the wife manually the whole of the furniture and effects then in or about Astrope Folly aforesaid, to hold the same for her own use and benefit absolutely.

There follows a recital that the husband being desirous of making further amends to the wife, and of providing for her both before and after his death, has agreed to enter into the covenants thereafter contained. Shortly, they are as follows:

"(a) That the husband will . . . pay all expenses now or hereafter arising in connexion with . . . Astrope Folly . . . and will at his own expense keep the said property in good and substantial repair and condition and pay all fire insurance premiums and mortgage interest payable in respect of the said property and the equitable charge thereon;

"(b) That the husband will forthwith execute a proper will . . . giving the whole of his estate both real and personal whatsoever and wheresoever situate to the wife for her own use and benefit absolutely and that such will . . . shall not be revoked or altered by the husband during the joint lives of the husband and wife."

In fact a will to this effect had already been executed in 1952. The covenants continue:

"(c) That the husband will pay to the wife on the first day of every month during [their] joint lives a sum reasonably sufficient for her support and maintenance and for the payment of household expenses of the kind hitherto usually paid by the wife out of moneys provided by the husband for such purpose, such sum in any event not to be less than £28 per month . . .

"(d) That the husband (in addition to the sums hereinbefore mentioned) will pay to the trustees during the joint lives of the husband and the wife such sums (hereinafter called 'the wife's personal allowance') as after deduction therefrom of income tax . . . and surtax (if any) will amount to the clear sum of £41 13s. 4d. per month [i.e. £500 a year]:

"(e) That the husband will pay all household and other expenses not payable by the wife out of the monthly sum mentioned in cl. 1 (c);

"(f) That the husband will also pay all legal costs, charges, fees . . . incurred by the wife in connexion with her matrimonial affairs including

the preparation and completion of this agreement and documents incidental thereto and the recited conveyance;

" (g) That the husband will at the request of the wife or the trustees and at his own expense forthwith execute and do all such instruments acts and things as the trustees or the wife may respectively require of him for the purpose of fully and effectually carrying out the terms of this agreement."

In consideration of the husband's covenants the wife covenants:

" (a) That the wife will not so long as the husband shall observe and perform his covenants . . . at any time hereafter take any proceedings against the husband in respect of any misconduct or alleged misconduct committed or alleged to have been committed prior to the date [of the deed];

" (b) That the wife will so long as the husband observes and performs his covenants . . . keep the husband indemnified against all debts and liabilities hereafter contracted or incurred by her, and will . . . support and maintain herself and will not pledge the husband's credit;

" (c) That the wife will pay such household expenses as are described in cl. 1 (c) hereof out of the moneys in that behalf hereinbefore covenanted to be paid by the husband."

By cl. 5 it was mutually agreed

" (a) That if owing to ill-health, retirement or some other extenuating circumstances which the trustees shall consider to be beyond the husband's control, the husband shall satisfy the trustees that his means have so materially depreciated that he is unable to continue to pay in full the moneys . . . covenanted to be paid under cl. 1 (d) . . . the wife will accept in lieu of the moneys so payable an annual sum which the trustees shall decide from time to time as being equal to one-third of the husband's total annual income (without deduction except for income tax), or, alternatively, a sum equivalent to the annual income received or due to the husband under [his father's] will . . . whichever shall be the greater amount."

The husband, so far, has not produced the figures required by the trustees for this purpose.

It will be noticed that there is no express provision in the deed for a resumption of cohabitation. In fact, as the letter of Dec. 21, 1953, shows, the wife had then already agreed to resume married life. I am satisfied that they had actually done so, and I accept the wife's evidence that they went together to spend Christmas with her relations at Bournemouth. Thereafter I find that except for a period of about ten weeks in or about April, 1955, when the wife was absent in Canada, they lived together at Astrope Folly until August, 1956, when the husband returned to the woman the association with whom had been the cause of the temporary separation. The husband, in accordance with his affidavit of June 17, 1958, tried to persuade me in evidence that the background to the deed was what he called " a separation basis ", and he pointed to the fact that he had given instructions to his accountants to negotiate with the Inland Revenue authorities on this basis.

I will deal with the oral evidence shortly. [His Lordship referred to the correspondence and reviewed the oral evidence of the husband and continued:] Counsel for the husband admitted at the conclusion of the evidence that on the facts he could not argue that the deed was made for the purposes of separation. He argued, however, that as a matter of law the agreement must be construed as being made for the purposes of the parties to a marriage living separately. This was put in two ways. First, starting with the premise that courts are not

concerned with the financial arrangements of spouses living together: *Balfour* v. *Balfour* (1); it was argued that the court should construe the statute as applying only to agreements which were not hitherto against public policy. Therefore, where the court has a choice whether to include or to exclude an agreement hitherto against public policy, then, unless the words of the statute are compelling, the court should construe it so as to include only such agreements as are not void as having hitherto been regarded as against public policy, such as agreements for future separation by spouses living together. Admitting that a provision contemplating future separation of spouses in a deed executed by them while living apart with the object and result of bringing them together as man and wife is not void on the ground of public policy: see *Re Meyrick's Settlement* (2) and *Lurie* v. *Lurie* (3); the court ought to decline to take cognisance of the agreement so far as it relates to the regulation of financial arrangements between spouses while living together, or, if it recognises the reconciliation agreement at all, to do so on the basis that it impliedly regulates the financial provision in the event of a second breakdown, and therefore is made for the purposes of the parties living separately. I am not impressed by this argument. I do not think that I am entitled to cut down the plain words of the statute in this artificial manner. In other words, the court in face of the plain words of the statute is not concerned with questions of public policy which are said to have prevailed before it was passed.

Secondly, the argument was put in a somewhat simpler form: namely, that where a husband and wife make a financial agreement which contemplates their living together in a state of reconciliation, the court will always infer, whether it is so expressed or not, that the agreement is intended to operate, even if the reconciliation should not endure. Every reconciliation, it was said, contains the seeds of a breakdown, and therefore an agreement like the present one should be looked at, not as governing only the period of reconciliation, but also as covering the event of the reconciliation not enduring. It was pointed out that in s. 1 (6) (a), defining the expression " financial agreements ", the words " provisions governing the rights and liabilities towards one another when living separately " are apt to apply to a separation arising later on the breakdown of the contemplated reconciliation, thus bringing the agreement within the Act, even though it was made while the parties were living together, and says nothing whatever about separation. Moreover, it was pointed out that the financial provisions themselves being either absolute as in the case of the conveyance of Astrope Folly, and the will made in the wife's favour, or for the joint lives, as in the case of the monetary provisions, are themselves apt to be applied if a state of separation supervenes.

In my opinion this argument is altogether too wide. What I am really asked to hold is that because an agreement granting a life interest, and a fortiori one making an out and out provision, governs the rights and liabilities towards one another of the parties to it, at least during their joint lives, and because the event of the parties living separately is an event which may occur during their joint lives, any such agreement is one governing the rights and liabilities towards one another when living separately, and is made, therefore, for the purposes of their living separately. This seems to me to make the duration of the agreed provision rather than the purpose or object with which the agreement is made the test of the applicability of the Act. In other words, it is contended that any eventuality, come what may, which can occur in the joint lives must necessarily be held to be

(1) [1919] 2 K.B. 571.
(2) [1921] 1 Ch. 311.
(3) [1938] 3 All E.R. 156.

a purpose of the agreement. One would, for example, be obliged to say that a life interest given to a wife by a post-nuptial settlement was a provision governing their rights and liabilities when living separately. Counsel for the husband did not shrink from accepting this illustration of his contention, and it is probably unprofitable to search for other examples.

In my opinion this interpretation makes nonsense of the terms of the Act. I find as a fact, and so hold, that the deed was made for the purposes of resuming cohabitation, and not otherwise, and that it was not made for the purposes of the spouses living separately. It was, in fact, intended, if possible, to prevent a repetition of the separation. In my judgment the originating summons fails for lack of jurisdiction and must be dismissed.

Order accordingly.

Solicitors: *M. A. Jacobs & Sons; Cardew-Smith & Ross.*

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J.)

October 30, 1958

GODDARD *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER

Housing—Clearance area—"Resources" of council—Requirement that local authority should be satisfied of the sufficiency of their resources before declaring clearance area—Validity of resolution and of subsequent compulsory purchase order—Housing Act, 1957 (c. 56), *s.* 42 (1), *proviso* (ii), *Sched. IV.*

Under the Housing Act, 1957, s. 42 (1), which confers power on a local authority to declare an area in their district to be a clearance area, the authority, by proviso (ii), must satisfy themselves before a resolution declaring a clearance area may be passed, that "the resources of the authority are sufficient for the purpose of carrying the resolution into effect". A borough council declared a site owned by the applicant to be a clearance area, their resolution stating that reports of meetings of their housing committee and the finance committee had been considered and it was resolved that, where necessary, such reports as varied by the adopted amendments should be approved and adopted as minutes of the council. The council did not have before them actual figures of the probable cost involved. A compulsory purchase order was made and confirmed in relation to the site owned by the applicant. The applicant applied, under sched. IV, para. 2, to the Act of 1957 for the order to be quashed, on the ground that the local authority had not been satisfied of the sufficiency of their resources within the meaning of proviso (ii) to s. 42 (1), with the result that the clearance resolution was invalid. The chairman of the housing committee deposed that his committee had considered whether, and were satisfied that, the resources of the local authority were sufficient.

HELD: the compulsory purchase order would not be quashed since it was competent to the local authority to be satisfied, without having specific figures before them, that their resources (which included their credit as well as their cash resources) were sufficient to carry the clearance resolution into effect, and here they had been so satisfied acting through their authorised committees.

APPLICATION by Mr. Wilton Joseph Goddard to quash a compulsory purchase order which had been made by the Brentford and Chiswick Borough Council and confirmed by the Ministry of Housing and Local Government on Apr. 22, 1958.

The ground of the application was that the resolution of the council declaring the area in question to be a clearance area was not within the powers of the Housing Acts, 1936 to 1956, and the Housing Repairs and Rents Act, 1954, or the Housing Act, 1957, in that a condition precedent to the making of the order was not performed, the condition being that, before passing the resolutions of Apr. 16 and July 30, 1957, which declared part of the land included in the

order to be clearance areas, the council should have satisfied themselves that their resources were sufficient for the purpose of carrying the resolution into effect.

W. G. Wingate and *Q. T. Edwards* for the applicant.

Rodger Winn for the respondents, the Minister of Housing and Local Government and the Brentford and Chiswick Borough Council.

LORD PARKER, C.J.: The application is made under the powers given in Sch. 4 to the Housing Act, 1957, the material words in para. 2 for this purpose being:

> " If any person aggrieved by such an order as aforesaid [that is, a compulsory purchase order] desires to question the validity thereof on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may . . . make an application for the purpose to the High Court . . ."

The court, if satisfied that the order was not within the powers of the Act, may quash the order generally, or in so far as it affects any property of the applicant.

The compulsory purchase order in question was confirmed on Apr. 22, 1958, and published on May 9, 1958. It was one of five compulsory purchase orders made by the council for the development or redevelopment of a site at Brentford, and covered land coloured grey on the plan put in, which included premises owned by the applicant, who there carried on the business of a retail electrician and electrical engineer. The council, pursuant to their powers under the Housing Acts, declared certain areas, including this area of grey land, to be a clearance area. The authority for that is to be found in s. 42 (1) of the Housing Act, 1957, which provides, stating it quite shortly, that a local authority, if satisfied that houses in the area are unfit for human habitation, and on a number of other matters,

> ". . . shall pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the subsequent provisions of this Part of this Act."

Having done that, they must immediately, or, to use the words of the Act, " so soon as may be ", take one of two steps; either they must make clearance orders calling on the owners of the houses in question to pull down those houses, or they may make compulsory purchase orders in order that they may by themselves or by contractors, demolish the buildings. In this case, the compulsory purchase order with which I am concerned was the result of two declarations of clearance areas, one in April and one in July, 1957. As a result of those clearance declarations having been made, the council made what I refer to as a draft compulsory purchase order including the houses within that clearance area, and such further areas as it was reasonably necessary to secure for the convenient development of the whole site (under s. 43 (2)), and thereafter the usual procedure of objections and public hearing took place, a report was made to the Minister, and ultimately, on Apr. 22, 1958, the draft compulsory purchase order was confirmed.

The grounds of challenge of the validity of the order concerned the question whether a condition in s. 42 (1) precedent to the making of the declaration of a clearance area was fulfilled. It is convenient to say at the outset that if it was not, it is admitted by counsel for the respondents that the compulsory purchase order as confirmed was not within the powers of the Act, and would accordingly fall to be quashed. The condition is, reading the material words of the proviso to s. 42 (1):

> "Provided that, before passing any such resolution [that is, declaring an area to be a clearance area] the authority shall satisfy themselves . . . (ii) that the resources of the authority are sufficient for the purpose of carrying the resolution into effect."

Counsel for the applicant puts forward broadly two contentions in this case. He says that the council, who are the authority in question, never did apply their minds to the question at all; secondly that, if they did, they either had no sufficient evidence which entitled them to be satisfied, or no evidence at all, or that they in some way misdirected themselves in consideration of the matter. The words, as I said, are "Provided . . . the authority shall satisfy themselves", and it is not for this court to consider what decision the court might have come to themselves if faced with the question. This court is merely charged with the duty of seeing that the council has not acted arbitrarily, and that it has acted bona fide.

For myself, I would adopt the words of SWIFT, J., in *Re Bowman, South Shileds (Thames Street) Clearance Order, 1931* (1). Having stated the general proposition that this court will not interfere, he goes on:

> "It may well be that there is a case, which is certainly not this case, in which it can be said that there was no material, there was no information and no representation before the local authority upon which they could, as reasonable people, possibly be satisfied that a clearance order ought to be made."

Counsel for the applicant says this is a case which comes within that principle, and the first way in which he puts it is this. He says that the council did not apply their minds to the question at all, and he bases that contention on the form of the internal documents which ultimately recorded the resolution. As I have said, there were two resolutions for the declaration of a clearance area, one in April and one in July. For this purpose, it is enough to take one of those resolutions, because the other is to all intents and purposes the same. The resolution of the council of July 30, 1957, merely said this:

> "Committee Reports: Reports of meetings of the under-mentioned committees, held on the dates indicated, were considered and it was resolved that, where necessary, such reports, as varied by the adopted amendments and corrections, be approved and adopted as minutes of the council."

Underneath is "Name of Committee: Housing. Date of Meeting: July 16, 1957". Further down in the same document, under "Name of Committee" is "Finance, Rating and Valuation". "Date of Meeting: July 23, 1957". So, counsel for the applicant says, the council were merely rubber-stamping something which the committee or committees had said. If one then turns on to what the housing committee said, it was, leaving out all immaterial matters, this:

> "After consideration thereof [that is, of the report of the Medical Officer of Health] and a report by the town clerk, we recommend that the council, being satisfied in respect of the areas above mentioned . . . respectively being areas within the borough that . . . (d) the resources of the council are sufficient for the purposes of carrying this resolution into effect the same be and are hereby declared clearance areas within the meaning of the Housing Act, 1936, and that the common seal of the council be affixed to such declarations and maps."

(1) 96 J.P. 207; [1932] All E.R. Rep. 257; [1932] 2 K.B. 621.

On the next page is set out a record of the meeting of the finance committee on July 23, which said this: " We considered the financial effect of the following recommendations by other committees and concur with the proposals ", and the relevant one is: " Housing committee . . . (4) ", that the areas in question " be declared clearance areas within the meaning of the Housing Act ". The wording of the recommendation of the housing committee to which I have referred is, to say the least, poor. It is, I think, purporting to put forward a recommendation of a draft resolution to be carried by the council and it does not say specifically, and this is counsel for the applicant's point, that that committee has considered whether the resources of the council are sufficient, and accordingly if that committee has not considered it, then the council have merely adopted and rubber-stamped what the housing committee had done, not themselves having considered it. As I have said, I think that the wording of the housing committee's recommendation is rather unfortunate, but I am quite satisfied that they and the finance committee intended to and did consider the matter themselves, and that the council being faced, as they thought, with recommendations by two of their specific committees dealing with the matter who had considered it, adopted the recommendation.

If that be the true position, it is quite clear that the council quite properly acting through their authorised committees, were satisfied. I think that must be the true view of the minutes themselves, but if there were any doubt, it is to my mind put beyond peradventure by the evidence of the chairman of the housing committee, who says in his affidavit that before making the recommendations to the council, his committee " considered and were satisfied of all the matters recited under para. 4 (2) (a) to (d) of the reports of the meetings of that committee ". As I have already said, para. (d) covers the question as to the resources of the council being adequate. In his draft statement of proof which was put in at the public hearing, the assistant borough treasurer said: " Prior to the passing of the resolutions declaring the three clearance areas the council were advised that their financial resources were such as would enable them to deal with those areas ". I cannot accede to counsel for the applicant's first point.

Counsel's second submission is that if the council did consider this matter, they had no, or no sufficient, evidence on which they could be satisfied. Before considering that submission in more detail, I think that it is necessary to consider what it is about which they have to be satisfied. They have to be satisfied that the resources of the authority are sufficient for the purpose of carrying the resolution into effect. At that stage, before the resolution is passed, they may not have made up their mind whether they will proceed thereafter by clearance order or by compulsory purchase order, and it is a possible view that they are only concerned to see whether the resources of the authority are sufficient to cover the less onerous way of performing the next step, in which case they might only have to be satisfied as to such matters as rehousing, the cost of compensation to displaced persons, and possibly any cost that they would be put to if an owner who had been called on to demolish failed to do so. For my part, I think that is putting too narrow a construction on that proviso. It seems to me that where, as here, the authority have determined which of the two steps they will take, in this case to proceed by compulsory purchase order, they must consider whether the resources of the authority are sufficient for that purpose. After all, although it is a second and alternative step, it is one that has to be taken " so soon as may be " after the area has been declared a clearance area, and I think that must be looked on as part and parcel of carrying the resolution into effect.

Counsel for the applicant argues further that where the authority are planning thereafter to redevelop the area themselves, and not to let it to other people for redevelopment, then what the council must consider is whether their resources are sufficient, not only to buy the land and pay compensation, but to carry out the proposed development. For my part, I cannot accept that contention. At a later stage it is perfectly open to the authority to change their mind; it is perfectly possible also, as indeed I think the evidence was in this case, that development must take place by degrees, and what is developed first may pay for later development. I do not think that in deciding whether to declare an area to be a clearance area, the council are in any way concerned to satisfy themselves of their resources if they do the redevelopment themselves.

The resolution of the council adopting the recommendation of the housing committee quoted the exact words of the Act: satisfied "that the resources of the [council] are sufficient for the purpose of carrying the resolution into effect". If the matter rested there, I do not think that one could go behind those words, but counsel for the applicant relies on various answers that were given under cross-examination by the borough engineer and the borough treasurer at the public hearing. Without going into detail, it was elicited that very large sums were involved in the total purchase and redevelopment, not merely of the land the subject of this compulsory purchase order, but the total land covered by other compulsory purchase orders in the area that I have referred to. One witness went so far as to say that in the end it might cost £550,000, and he did say that no specific figures were before the council or the housing committee when they made the resolution and the recommendation respectively. On that counsel for the applicant says that they could not have been satisfied, that there ought to have been evidence before them of the actual figures of expenditure involved under this scheme, and also evidence how the money was to be found if the resources were not cash resources. He says there being no evidence as to either of those matters, this case falls within the sort of case which SWIFT, J., contemplated in *Re Bowman* (1), and that this order should be quashed.

For my part I would only accede to that argument in a very clear case. It seems to me that here I am faced with the resolution which says: this matter has been considered. The chairman of the housing committee says that it was considered by his committee, and that the council, in passing the resolution, were so advised. True they may not have had specific figures, but it is very difficult in cases such as this to believe that they could have specific figures with any accuracy. Nobody knows what the compensation payable is going to amount to, especially when one considers questions such as disturbance, and nobody knows even if you are going to consider redevelopment costs, what they are likely to be in this era of rising prices. It seems to me that it is perfectly competent for a council, without having specific figures, with the assistance of its experts, to say: this quite clearly from our own knowledge is a matter which plainly comes within the resources of this council, and "the resources" there clearly means not merely cash resources, but their credit in the world, their ability to borrow, and all the rest of it.

For my part, I am not satisfied that it has been shown in this case that the council acted on no evidence; that they were acting mala fide is certainly not suggested. In these circumstances, this application fails, and must be refused.

Motion dismissed.

Solicitors: *P. H. Berry & Co.*, Brentford; *Solicitor, Ministry of Housing and Local Government.* G.A.K.

(1) 96 J.P. 207; [1932] All E.R. Rep. 257; [1932] 2 K.B. 621.

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CHANCERY DIVISION

(DANKWERTS, J.)

October 30, 1958

Re SAHAL'S WILL TRUSTS. ALLIANCE ASSURANCE CO., LTD. *v.* ATTORNEY-GENERAL AND OTHERS

Charity—Children's home—Gift to local authority of house to establish a children's home—Bequest for benefit of one or more children in home—Alternative purpose—Hostel for "poor, aged, and infirm people."

The testator, by his will dated November 23, 1953, gave his dwelling-house to a local authority "to use and maintain the same as a children's home". He further bequeathed to the local authority the sum of £2,000 "to apply the yearly income therefrom for the benefit of such one or more of the children for the time being resident in the said house", provided that, if the corporation "shall discontinue the use of the said dwelling-house as a children's home", it should be used and maintained "as a hostel for young soldiers, sailors, airmen, or merchant seamen, or for poor, aged and infirm people of the neighbourhood". The local authority intended to accept the gift if they could use it as a home for old people.

HELD: (i) the gift to the local authority for founding a children's home was a charitable gift (*Re Cole (deceased)*, (1958), 122 J.P. 433, distinguished), but the gift for the benefit of children in the home was invalid because it could not be distinguished from a similar gift which was declared void in *Re Cole;* (ii) the proviso contained alternative trusts, and gifts for a home for poor aged people and a hostel for young servicemen or merchant seamen were both charitable gifts, and, therefore, the local authority was entitled to use the house for a home for aged people without first having established a children's home.

ADJOURNED SUMMONS.

By his originating summons, dated May 13, 1958, the plaintiff, the trustee of the will of Isaac Felix Sahal, deceased, asked for the determination of the following questions (among others): (i) whether the trusts by cl. 8 declared concerning the house and money comprised therein were valid charitable trusts or whether the same failed for perpetuity or otherwise; (ii) whether the Salford Corporation would be at liberty to hold and apply the trust property in the manner provided by cl. 8 (iv) without having first held and applied the same in manner provided by cl. 8 (i).

Wolfe for the plaintiff, the trustee of the will of the testator.
Denys B. Buckley for the first defendant, the Attorney-General.
H. C. Easton for the second defendant, Salford Corporation.
Brunyate for the third defendant, the Solicitor-General.

DANCKWERTS, J.: The testator's will was dated Nov. 23, 1953, and he died on May 5, 1956. I am concerned with the gift made by cl. 8 of the will. By cl. 8 (i) the testator devised and bequeathed his

> "dwelling-house known as 'Summerhill' Kersal in the City of Salford to the Salford Corporation Upon trust to use and maintain the same as a children's home to be known as 'Sahal House' And it is my desire that the said home shall be conducted as far as possible along domestic and not along institutional lines and without discrimination whatsoever on grounds of race religion colour or creed and that food prepared in accordance with the requirements of the Jewish religion shall always be available . . ."

He further desired that a person employed by him should be allowed to reside there for a year. He bequeathed (by cl. 8 (ii)) all family portraits and photographs to the corporation, and expressed a desire that they should remain hanging on the walls if possible. By cl. 8 (iii) he bequeathed to the corporation

> " the sum of £2,000 Upon trust to invest the same as a fund to be known as the ' Sahal Welfare Fund ' in or upon any of the investments hereby authorised and to apply the yearly income therefrom for the benefit of such one or more of the children for the time being resident in the said house as they shall in their absolute discretion think fit."

Clause 8 (iv) contains a proviso:

> " Provided always that if at any time the said corporation shall discontinue the use of the said dwelling-house as a children's home as aforesaid the said dwelling-house shall be held upon trust to use and maintain the same as a hostel for young soldiers sailors airmen or merchant seamen or for poor aged and infirm people of the neighbourhood and the said fund lastly hereinbefore bequeathed and the income therefrom shall thereafter be applied in purchase of extra comforts for the residents in such hostel."

The testator disposed of his residuary estate on trust to charities to be selected by his trustee, and consequently there is a contest between the corporation and the charities.

I should not have found any difficulty whatever in coming to a conclusion that the gift of the house and the gift of the fund were both charitable but for the decision of the Court of Appeal in *Re Cole* (1). There the defendant, the East Sussex County Council, maintained a house called Southdown House under the powers contained in the Children's Act, 1948, s. 15, which was a house for the accommodation of children committed to their care. A testator devised to his trustees two freehold houses on trust to apply the income therefrom

> " for the general benefit and general welfare of the children for the time being in Southdown House . . . as a small token of appreciation of the work carried on at such house."

The home which the testator desires to found in the present case is of a similar nature to that which was the subject of the bequest in *Re Cole* (1), because the testator's intention was to found a home which the Salford Corporation would carry on under the statutory powers which it had, i.e., to maintain therein children who needed care and control due to their lack of amenities of a home or environment, or, through the failure of their parents, required to be assisted by being put in a home of this kind. In *Re Cole* (1) the majority of the Court of Appeal held that the gift of the houses for the purposes of creating a fund for the general benefit and general welfare of the children for the time being in the home was not a valid charitable trust. LORD EVERSHED, M.R., dissented. The reasons for the conclusion reached by the majority appear to be that the funds applied for the purpose of supplying any sort of amenity in these homes, without apparently being necessarily amenities essential to the welfare of the children, involved a perpetuity, and the purpose was not to be regarded as charitable. HARMAN, J., took the same view.

That decision is binding on me, and, if it covers the case which I have now to consider, I shall have to follow it; but the Court of Appeal plainly left open the case of a gift for the endowment or maintenance of a house of this kind, and I think also left out of their decision the question of a gift for the purpose of founding a home of this kind for these types of children. For that reason, the present case, as regards the general gift in cl. 8 (i) is not covered by the decision of the Court of Appeal. It appears to me on general grounds, which are to be found by an analogy from the preamble to the Statute of Elizabeth 1, 43 Eliz. 1 c.4,

(1) 122 J.P. 433; [1958] 3 All E.R. 102.

that this is a gift for a class of person which the ambit of charity covers, and, therefore, the gift of the house for the purpose of the founding of a children's home by the Salford Corporation is a valid charitable gift.

As regards the fund, however—the result is very unfortunate—I am bound by the terms of the decision of the Court of Appeal. I find myself unable to distinguish the terms of the gift contained in cl. 8 (iii) of the will from the terms of the gift which was considered by the Court of Appeal in *Re Cole* (1). If anything, it appears to me that taking the grounds on which the majority of the Court of Appeal came to the conclusion that they did, the present gift is more difficult to justify than the gift in *Re Cole* (1). Accordingly, the gift of the fund was not a valid charitable bequest.

I have now to consider the effect of the gift in cl. 8 (iv) of the will:

> " Provided always that if at any time the said corporation shall discontinue the use of the said dwelling-house as a children's home as aforesaid the said dwelling-house shall be held upon trust to use and maintain the same as a hostel for young soldiers sailors airmen or merchant seamen or for poor aged and infirm people of the neighbourhood and the said fund lastly hereinbefore bequeathed and the income therefrom shall thereafter be applied in purchase of extra comforts for the residents in such hostel."

Counsel for the Solicitor-General argued that the words should be construed in a strict manner so that this gift cannot take effect unless the corporation had first started the children's home for some period and then had discontinued it. I do not think that that is the right way to deal with the clause. It seems to me that what the testator is really doing is giving an alternative trust which is subject to the primary trust which he has directed in the first clause of his will. Therefore, it would be absurd that the corporation should be required to construct a home for perhaps a day and then abandon it, and then turn to the second alternative trust. It appears to me that it is unnecessary for the home ever to have been brought into being, and this trust is now valid. The two purposes, if they be purposes, and not one general purpose, seem to me to be charitable. They come within the general terms of the preamble to the Statute of Elizabeth 1, 43 Eliz. 1 c. 4, which will be found described in TYSSEN'S LAW OF CHARITABLE BEQUESTS (2nd Edn.) 28: " The list contained in the statute is as follows: (1) The relief of aged, impotent and poor people ". The testator has practically used the same phrase as regards the second purpose, and that is the one which the corporation desires to carry out, " for poor aged and infirm people ". "(2) The maintenance of sick and maimed soldiers and mariners ". I emphasise the word " mariners ", because there is a reference in cl. 8 (iv) of the testator's will to " merchant seamen ".

> " (3) The maintenance of schools of learning, free schools, and scholars in universities. (4) The repair of bridges . . . (5) The education and preferment of orphans. (6) The relief, stock, or maintenance for houses of correction. (7) Marriages of poor maids. (8) The supportation, aid, and help of young tradesmen . . . (9) The relief or redemption of prisoners or captives. (10) The aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes."

From the last it looks as if the object of the statute was the relief of poor inhabitants rather than soldiers, but the decisions have gone a long way from that interpretation in a number of cases in which what may be called service charities have been held to be objects of a charitable nature. The general result is

(1) 122 J.P. 433; [1958] 3 All E.R. 102.

that the purposes described by the testator in this clause of his will are valid charitable purposes. The position as regards the gift of the fund will not be the same, because I have held, as a result of the decision of the Court of Appeal in *Re Cole* (1), that the fund is not held on charitable purposes in the first instance, and, therefore, that it suffers from the prohibition against perpetuities, and the alternative gift in cl. 8 (iv) will fail as well.

Accordingly, it seems to me that the Salford Corporation is entitled to accept the gift of the house for the purposes of a home for aged and infirm people in the neighbourhood, but that the gift of the fund fails.

Declarations accordingly.

Solicitors: *Skelton & Co.*, Manchester; *Treasury Solicitor*; *Town Clerk*, Salford.

F.G.

(1) 122 J.P. 433; [1958] 3 All E.R. 102.

COURT OF CRIMINAL APPEAL

(Lord Parker, C.J., Cassels and Diplock, JJ.)

November 17, 1958

R. *v.* AYU

Criminal Law—Sentence—Maximum sentence—Order that at end of imprisonment offender should return to Nigeria, with further imprisonment in default—Invalidly of order.

A Nigerian was convicted at a magistrate's court and committed for sentence to quarter sessions as an incorrigible rogue under s. 5 of the Vagrancy Act, 1824. The recorder sentenced him to twelve months' imprisonment (the maximum sentence) and further ordered that at the end of such term of imprisonment as he should serve he should enter into a recognisance to return forthwith to Nigeria and not to return to this country for five years, and that, in default of entering into such recognisance, he should undergo a further six months' imprisonment.

Held: that, though an order binding over an offender to come up for judgment when called upon in lieu of sentence could lawfully include a condition requiring the offender to leave this country and not to return for a specified period, such a condition could not be included in an order of binding over to keep the peace made under the Justice of the Peace Act, 1361, which was the order made in the present case, and, therefore, the order made by the recorder being one which could not lawfully be made, that order must be quashed, leaving the sentence of imprisonment to stand.

R. v. *McCartan* (1958), 122 J.P. 465, explained.

Appeal against sentence.

The appellant, James Ayu, a native of Nigeria, was convicted at a magistrates' court at Brighton on Sept. 11, 1958, of being found in a dwelling-house for an unlawful purpose contrary to s. 4 of the Vagrancy Act, 1824, and was committed to quarter sessions for sentence as an incorrigible rogue. At Brighton Borough Sessions, on Sept. 22, 1958, he was sentenced to twelve months' imprisonment and an order was made on Sept. 24, 1958, that at the end of such term of imprisonment as he might serve he should be bound over to return to Nigeria and that he should not return to this country for five years; in default of entering into such recognisance he should be imprisoned for six months.

On Oct. 24, 1958, the appellant moved the Divisional Court for an order of certiorari to have the order quashed. The proceedings were adjourned for him to appeal to the Court of Criminal Appeal against his sentence. The grounds of appeal were that the recorder had no jurisdiction to make the order, because (i) he had no jurisdiction at all to order the appellant to be bound over to be sent to Nigeria and not to return to this country for five years; (ii) alternatively, if the recorder had jurisdiction to make such matters to be the conditions of a recognisance, it could be only in respect of a recognisance to come up for judgment; and (a) an order to enter into a recognisance to come up for judgment could not be made in respect of an incorrigible rogue, or (b) such an order could only be made in lieu of, and not in addition to, any order imposing imprisonment.

M. D. L. Worsley for the appellant.
Pensotti for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant was convicted at a magistrates' court at Brighton of being found in a dwelling-house for an unlawful purpose and was committed to quarter sessions for sentence as an incorrigible rogue. At Brighton Borough Sessions he was sentenced by the recorder to twelve months' imprisonment and an order was made

> "that at the end of any imprisonment which he may undergo or at such earlier date as the Home Secretary may direct he is bound over in his own recognisance in the sum of £10 to accompany an escort to the train, boat or aeroplane where he will be sent to Nigeria as soon as arrangements can be made and that he does not land again in this country for a period of five years thereafter. In default of his so entering into such recognisance he will be imprisoned for six months."

The appellant is apparently a native of Lagos. He came to this country in 1939 and had various jobs, but since 1948 he has done no regular work whatsoever. He has had some sixteen convictions, for most of which he has been given short sentences of imprisonment varying from one month to two years. He has already been found to be an incorrigible rogue, and in September, 1958, he was given twelve months' imprisonment. Quite clearly, if it is possible to make an order imposing a condition that he goes back to his country and stays there, so much the better, but the whole question is whether there is any power to make such an order. It seems clear that this is possible and, indeed, it has been done, in the case of an order binding a man over to come up for judgment when called on. That is a binding-over to keep the peace and come up when called on, made in lieu of sentence. Such a condition has been imposed in one or two cases and approved by this court, but we know of no case where such a condition can be inserted in a binding-over order under the Justices of the Peace Act, 1361. Indeed, when one comes to think of it, it would be rather startling if the jurisdiction which can be exercised by a single magistrate to bind over under that Act could be made on conditions of any sort.

The learned recorder here went into the matter with very great care, and he was minded, if he could, to make this order. As I understand it, he was anxious that the matter should come before this court to see whether it could be done. It may be that he was to some extent misled by *R.* v. *McCartan* (1). That was a case which had been referred to the Court of Criminal Appeal under s. 19 (b) of the Criminal Appeal Act, 1907, by the Home Secretary. The real question there on which the advice of the court was sought was whether it was

(1) 122 J.P. 465; [1958] 3 All E.R. 140.

possible to make it a condition of a probation order that a man should leave the country and go in that case to Northern Ireland, and the court, in saying that they were clearly of opinion that no such condition could be made, did go on to say it could be made a condition of a binding-over. LORD GODDARD, C.J., quoted the words which he had used in *R.* v. *Flaherty* (1) in these terms:

> " I then called on the boy and said: ' The court is going to bind you over in your own recognisance in the sum of £10 that you accompany an escort to the train, where you will be sent to Eire tonight or as soon as arrangements can be made, and you must not land again in this country for at least three years.' "

On the face of that, it might be thought that a condition was being inserted in a binding-over under the Act, but when one looks at the record it is quite clear that the order made in that case was an order made after the sentence had been quashed providing that the offender was to come up when called on for judgment, and in effect by way of condition saying: " You will not be called up for judgment if you go to Eire and reside there for three years without coming back ". That form of order, a binding-over to come up for judgment when called on, could not be made in this case in addition to the twelve months' imprisonment; and, there being no power to make that condition part of a binding-over under the Act which the recorder could make as a magistrate, the order he made must be quashed leaving the sentence on this appellant as the sentence of twelve months' imprisonment. I should add that this case shows very clearly the need, which has already been canvassed, I understand, in other quarters, for there being power to deport a man such as the appellant.

Appeal allowed.

Solicitor: *Registrar, Court of Criminal Appeal*; *Town Clerk*, Brighton.

T.R.F.B.

(1) (1958), " The Times ", June 24.

QUEEN'S BENCH DIVISION

(LORD PARKER, HILBERY AND DIPLOCK, JJ.)

November 4, 21, 1958

Re HASTINGS

Habeas Corpus—Criminal matter—Application refused by Divisional Court of Queen's Bench Division—No right to apply on similar facts and grounds to another Divisional Court of same Division.

An applicant for a writ of habeas corpus in a criminal matter, whose application has been heard by a Divisional Court of the Queen's Bench Division, is not entitled to be heard on an application based on the same facts and grounds by another Divisional Court of the same Division.

QUAERE, whether such an applicant is entitled to go from judge to judge of the Queen's Bench Division in term time.

APPLICATION for habeas corpus.

The applicant, Edward Thomas Hastings, was convicted at Liverpool Crown Court on an indictment containing five counts, the first for larceny, and the others for obtaining money by false pretences and fraudulent conversion. He was sentenced by the recorder to four years' corrective training, which was not expressly stated to be on each count to run concurrently. On appeal to the Court of Criminal Appeal the conviction on the first count was quashed, but the sentence was not altered. The applicant then obtained leave to apply to the Divisional Court for a writ of habeas corpus, the grounds of the application being that he was being illegally detained in prison as the sentence was a general sentence on the five counts, and, the conviction on one count having been quashed, there was no legal sentence applicable to the other four counts. The application was heard on Mar. 7, 1958, by a Divisional Court consisting of LORD GODDARD, C.J., STREATFEILD and SLADE, JJ., who refused the writ, holding that, as a matter of construction, the words used by the recorder in passing sentence amounted to the passing of concurrent sentences of four years' corrective training on each count so that the quashing of the conviction on one count had no effect on the sentence, which remained valid: see 122 J.P. 283. The applicant appealed to the Court of Appeal, who refused to entertain the appeal on the ground that it arose in a criminal cause or matter, and he then obtained leave to apply for habeas corpus to another Divisional Court differently constituted.

Butter for the applicant.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*) and *Rodger Winn* for the respondent.

Cur. adv. vult.

Nov. 21. **LORD PARKER, C.J.:** The judgment which I am about to read is the judgment of the court in the preparation of which we all collaborated.

In these proceedings counsel for the applicant moves for a writ of habeas corpus to bring up the body of one Edward Thomas Hastings, at present detained in Liverpool Gaol undergoing a sentence of four years' corrective training, with a view to his being discharged. The ground of the application is that no valid sentence has ever been passed on him. What happened was this. The applicant was convicted at the Liverpool Crown Court on five counts. The first count was a count of larceny as a bailee, a felony, the other counts were for misdemeanours, obtaining money by false pretences and fraudulent conversion. The learned recorder in passing sentence said this:

> "Edward Thomas Hastings, you have been convicted on the plainest evidence of deliberate, calculated and systematic frauds. Those frauds have not only affected companies well able to sustain loss but have cruelly brought grave financial burdens on little men which it will be difficult for them to bear. This is by no means the first time you have been convicted of dishonesty. You are a menace to the integrity and health of the commercial community. You will go to prison for four years' corrective training."

The recorder did not say "concurrent on each count" and the sentence indorsed on the indictment was merely four years' corrective training, again without any express statement that it was on each count to run concurrently. The applicant was granted leave to appeal to the Court of Criminal Appeal against conviction on three counts including the count for felony and in the result that count was quashed.

In these circumstances the argument sought to be adduced to this court in support of the application for a writ of habeas corpus is that the sentence was a general sentence on the five counts and that, one count having been quashed, there is no legal sentence applicable to the four remaining counts and that accordingly there is no valid authority for the applicant's detention.

This, however, is not the first application for the writ. An application was heard (122 J.P. 283), by a Divisional Court (consisting of LORD GODDARD, C.J., STREATFEILD, J., and SLADE, J.). The court refused the writ, holding that as a matter of construction the words used by the learned recorder amounted to concurrent sentences of four years' corrective training on each count and that accordingly the quashing of one count had no effect on the sentence, which remained a valid sentence. The applicant then appealed to the Court of Appeal who refused to entertain the appeal on the ground that it arose in a criminal cause or matter in which they had no jurisdiction. The applicant then renewed his application to a Divisional Court consisting of three different judges, it being contended that he had the right to go from judge to judge and from one Divisional Court of three judges to another Divisional Court of three different judges. The court being of opinion that there was an arguable point gave leave to move but subject to the court being satisfied that they had jurisdiction to hear and were bound to hear a fresh application. We should add that the present application is on exactly the same grounds and on the same evidence as in the previous application.

The Solicitor-General for the respondent has contended first that, contrary to what has been generally presumed, an applicant has never had a right to go, as it is said, from judge to judge except when the court is not sitting. Secondly, and in the alternative, that though prior to the Supreme Court of Judicature Act, 1873, an applicant could go from court to court, for example, from the Court of Queen's Bench to the Court of Common Pleas, yet at any rate since 1880, when by Order in Council the Queen's Bench, Common Pleas and Exchequer Divisions of the High Court were fused, an applicant who has been to a Queen's Bench Divisional Court has exhausted his rights in regard to all the judges of the Queen's Bench Division.

It is undoubtedly assumed today to be the law that an applicant for a writ of habeas corpus in a criminal matter—and we are only dealing with criminal matters—can apply to every judge in turn. In *Cox* v. *Hakes* (1) one of the leading authorities on habeas corpus, LORD HALSBURY, L.C., said:

> "For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards

(1) (1890), 54 J.P. 820; 15 App. Cas. 506; (1887), 20 Q.B.D. 1; 19 Q.B.D. 307.

of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might—see *Ex p. Partington* (1)—make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge."

Again, in the more recent case before the Judicial Committee of *Eshugbayi Eleko* v. *Nigeria Government (Administering Officer)* (2), LORD HAILSHAM, L.C., said:

"If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that, although by the Judicature Act the courts have been combined in the one High Court of Justice, each judge of that court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application."

Further, in *Ex p. Chapple* (3), DENNING, L.J., said:

"In the year 1679, when the writ of habeas corpus was given its modern efficiency, Parliament conferred the power of issuing it, not only on the judges of the King's Bench, who had theretofore issued it, but also on the Lord Chancellor, the Lord Keeper, the judges of the Common Pleas, and the barons of the Exchequer. Indeed, s. 10 of the Habeas Corpus Act, 1679, provides: 'That it shall and may be lawful to and for any prisoner and prisoners as aforesaid, to move and obtain his or their habeas corpus as well out of the High Court of Chancery or Court of Exchequer, as out of the Courts of King's Bench or Common Pleas or either of them'; so that in those days a subject could apply to any of the superior courts of the realm to issue a writ of habeas corpus. Not only was the subject entitled to apply for the writ, but the judges themselves were obliged to issue it in proper cases and were subject to severe penalties if they did not do so. If any court or judge refused to issue it, the applicant had no right to appeal to a higher court, but he could go from court to court and from judge to judge without being met by a plea of res judicata."

Counsel for the respondent, however, points out that the views of LORD HALSBURY and of DENNING, L.J., were expressed obiter and that *Eleko* v. *Nigeria Government* (2), though persuasive authority, is not binding on this court. He accordingly asks us to look at the matter afresh.

We think that it is clear that at any rate since the end of the eighteenth century an applicant has always had the right to apply successively to every tribunal competent to issue a writ of habeas corpus. The problem thus involves ascertaining first what tribunals had that power before the passing of the Judicature Act, 1873, and secondly on what tribunals that power has devolved as a result of that Act and its successors, in particular the Supreme Court of Judicature (Consolidation) Act, 1925. In considering the early history of the matter it is relevant to bear in mind that the common law courts of King's Bench, Common

(1) (1845), 9 J.P. 443; 13 M. & W. 679.
(2) [1928] A.C. 459.
(3) (1950), 66 (pt. 2) T.L.R. 932.

Pleas and Exchequer functioned as courts only in term time and that each of the four legal terms was one of brief duration. Consequently the greater part of the year fell during the legal vacations although the judges of the courts might be sitting under commissions of assize, oyer and terminer and general gaol delivery or hearing cases in Middlesex at nisi prius. Furthermore, each of the common law courts sat in banc and no individual judge of the court had any general power to act for the court. Even a decision at nisi prius only became a judgment of the court on motion to the court on the fourth day of the term next following the verdict at nisi prius.

The position prior to the passing of the Habeas Corpus Act, 1679, is far from clear. It is noteworthy, however, that in the Habeas Corpus Act, 1640, s. 6, it was provided as follows:

> ". . . if any person shall hereafter be committed, restrained of his liberty, or suffer imprisonment, by the order or decree of any such Court of Star-Chamber, or other court aforesaid, now or at any time hereafter, having or pretending to have the same or like jurisdiction, power, or authority, to commit or imprison as aforesaid, or by the command or warrant of the King's Majesty, his heirs or successors, in their own person, or by the command or warrant of the council board, or of any of the lords or others of His Majesty's Privy Council, that in every such case every person so committed, restrained of his liberty, or suffering imprisonment, upon demand or motion made by his counsel, or other employed by him for that purpose, unto the judges of the Court of King's Bench or Common Pleas, in open court shall, without delay, upon any pretence whatsoever, for the ordinary fees usually paid for the same, have forthwith granted unto him a writ of habeas corpus to be directed generally unto all and every sheriffs, gaoler, minister, officer, or other person in whose custody the party committed or restrained shall be, and the sheriffs, gaoler, minister, officer, or other person in whose custody the party so committed or restrained shall be, shall at the return of the said writ, and according to the command thereof, upon due and convenient notice thereof given unto him, at the charge of the party who requireth or procureth such writ, and upon security by his own bond given, to pay the charge of carrying back the prisoner, if he shall be remanded by the court to which he shall be brought, as in like cases hath been used, such charges of bringing up and carrying back the prisoner to be always ordered by the court, if any difference shall arise thereabout, bring, or cause to be brought, the body of the said party so committed or restrained unto and before the judges or justices of the said court from whence the said writ shall issue, in open court, and shall then likewise certify the true cause of such his detainor or imprisonment, and thereupon the court, within three court-days after such return made and delivered in open court, shall proceed to examine and determine whether the cause of such commitment appearing upon the said return be just and legal, or not, and shall thereupon do what to justice shall appertain, either by delivering, bailing, or remanding the prisoner; and if any thing shall be otherwise wilfully done, or omitted to be done by any judge, justice, officer or other person aforementioned, contrary to the direction and true meaning hereof, that then such person so offending, shall forfeit to the party grieved his treble damages, to be recovered by such means, and in such manner as is formerly in this Act limited and appointed for the like penalty to be sued for and recovered."

The reference is always to the judges sitting as a court and an open court and not to them as individual judges. This was an Act to extend the right to the writ

of habeas corpus, not to diminish the rights to it previously enjoyed by the subject. If before the passing of this Act the subject had had any recognised right to apply to each individual judge in turn or to an individual judge without having to apply to the judges sitting as a court, it is difficult to suppose that the Act would have been framed in the terms in which we find it enacted.

The Court of King's Bench unquestionably had the power to issue the writ of habeas corpus ad subjiciendum in criminal and supposed criminal matters in term time. It appears from the judgment of BLACKSTONE, J., in *Wood's Case* (1) that the Court of Common Pleas had by 1679 successfully asserted a similar general power, originally by making use of the legal fiction that the applicant was a party to a current suit in the Common Pleas, a fiction that was dropped after the passing of the Habeas Corpus Act, 1640. The Court of Exchequer had not, by 1679, acquired any general power to issue the writ, but made use of it in the case of persons genuinely privileged to be sued only in the Court of Exchequer. There appears to be no trace, however, of any of these courts exercising the power to issue the writ except in term time and on motion to the court sitting in banc. According to the views of COKE and of HALE the writ could issue out of Chancery in term time or in vacation, although LORD NOTTINGHAM, L.C., in *Jenkes's Case* (2) took the contrary view, a decision which has been described as being the cause of the passing of the Act of 1679.

The Act of 1679 was a procedural Act. It applied only to persons detained for criminal or supposed criminal matters and was directed specifically to the abuse of detaining persons in prison without bail, and without bringing them to trial. So far as is relevant to the present inquiry it did two things which had much wider consequences: (1) by s. 9 it provided that in criminal or supposed criminal matters the High Court of Chancery and the Court of Exchequer as well as the courts of King's Bench and Common Pleas should have power to issue the writ of habeas corpus ad subjiciendum; and (2) by s. 2 it provided that in criminal or supposed criminal matters any judge of those courts could in vacation act for the court of which he was a member, and, if on return of the writ he found that the case was bailable, could release the prisoner on his recognisances to take his trial in the Court of King's Bench the term following, or at the next assize sessions or general gaol delivery to be held in the place where the offence of which the prisoner was charged was cognisable.

The powers conferred by this Act on single judges were thus limited in three respects, first as to the type of case in which they could be exercised, namely, criminal and supposed criminal matters, secondly, as to the powers of the judge, namely, to bail the prisoner, and thirdly, as to the time in which they could be exercised, namely, in vacation. It seems that by the middle of the eighteenth century the first two limitations on the powers of a single judge had ceased to operate in practice. By 1758 the Court of King's Bench treated the writ of habeas corpus as issuable, in all cases not merely criminal and supposed criminal cases, by a single judge in vacation, and the power of the judge on the return as extending to discharging and not merely to bailing the prisoner: see *R.* v. *Shebbeare* (3), *R.* v. *Mead* (4), *R.* v. *Clarke* (5). This was, no doubt, a natural extension of the statutory power, since if the judge on the return of the writ in a supposedly criminal case was to find that it was not a criminal case and that the detention was unlawful it would not be consonant with the liber-

(1) (1771), 2 Black. W. 745.
(2) (1676), 6 State Tr. 1190.
(3) (1758), 1 Burr. 460.
(4) (1758), 1 Burr. 541.
(5) (1758), 1 Burr. 606.

tarian views of common lawyers in the eighteenth century that the prisoner should not be ordered to be discharged.

The Habeas Corpus Act, 1816, gave statutory recognition to these extensions of the powers of a single judge in vacation which had already been adopted by the Court of King's Bench and extended them to judges of the Common Pleas and the Exchequer. It also gave these judges and their respective courts in term time the power to inquire into the truth of the return. It did not apply to the Court of Chancery which was slower to assert the general power to issue writs of habeas corpus except as authorised by the Act of 1679, but in *Crowley's Case* (1) LORD ELDON, L.C., after an elaborate examination of the history of the matter, held that the Lord Chancellor had the general power to issue writs of habeas corpus in term or in vacation.

But while the limits on the powers of a single judge of the common law courts granted by the Act of 1679 were in these two respects swept away by the practice of the King's Bench Court in the eighteenth century and finally by the Act of 1816, there is no suggestion that we can find in the cases or the writings of lawyers that the third limitation, namely, that a single judge could issue the writ in vacation only, was ever impinged on. Thus in CHITTY'S CRIMINAL LAW (2nd Edn.) (1826), vol. 1, at p. 124, it is stated that it

> " must be obtained by motion to the court in term time, and by application to a judge in vacation."

The practice is also so stated in the judgment of ABBOTT, C.J., in *Hobhouse's Case* (2). We think it is established that in term time the writ was issuable only by the court sitting in banc. Except in vacation a single judge had no power to issue it.

There is no doubt that in term time an applicant could go from court to court, that is, from King's Bench to Common Pleas, from Common Pleas to Exchequer, from Exchequer to Chancery, and it may well be that in vacation he could go from judge to judge even of the same court. But it appears clear that he could not apply twice to the same court on the same facts for while the decision whether or not to issue a writ of habeas corpus is not a judgment so that there is no res judicata it is not a writ of course (*Hobhouse's Case* (2)) and the decision whether or not to issue it involves the exercise of a judicial discretion. The court must have an inherent jurisdiction to refuse, having once exercised its discretion, to hear the same matter argued again. Thus, in *Re Cobbett* (3) an application had been refused by the Court of Queen's Bench and again by the Court of Exchequer. It was then made a second time to the Court of Exchequer when PARKE, B., in the course of the argument said: "You have been heard once; we cannot enter into this matter again". The common law courts, as we have already mentioned, prior to the Supreme Court of Judicature Act, 1873, sat in banc, all members of the court available in London sitting together, although there might on occasions be absentees. But the decision was the decision of the court, and there is no suggestion to be found in any of the cases that the absence of one or more members would enable an applicant to apply again to the same court when it was differently constituted.

What, then, is the historical foundation for the dictum of LORD HALSBURY, L.C., in *Cox* v. *Hakes* (4)? He refers to *Ex p. Partington* (5). In that case an

(1) (1818), 2 Swan. 1.
(2) (1820), 3 B. & Ald. 420.
(3) (1845), 5 L.T.O.S. 130.
(4) (1890), 54 J.P. 820; 15 App. Cas. 506; (1887), 20 Q.B.D. 1; 19 Q.B.D. 307.
(5) (1845), 9 J.P. 443; 13 M. & W. 679.

application for the writ had been refused by the Court of Queen's Bench. The application was renewed before and refused by the Lord Chief Baron and was then renewed before the Court of Exchequer. PARKE, B., giving the judgment of the court refusing the application, said this:

> "The defendant, however, had a right to take the opinion of the court as to the propriety of the imprisonment; and, therefore, we have thought it proper to examine attentively the provisions of the statute [under which the applicant was in custody] without considering ourselves as concluded by these decisions. But we are all of opinion, that the defendant is not entitled to his discharge; and we entirely agree in the judgment of the Court of Queen's Bench, which was approved of by the Lord Chief Baron, and are satisfied of the correctness of the reasons stated to us to have been assigned by LORD DENMAN for that judgment."

PARKE, B., therefore, was only expressly affirming the right to go from one court to another. That the application to the Lord Chief Baron was made in vacation is not expressly stated, but it was anyhow made in chambers, and in view of what we have already indicated as to the practice we think it reasonably certain that it was made in vacation. In the report of the case in 9 Jur. at p. 93, however, there appears an interjection of POLLOCK, C.B., to whom the previous application had been made in these words: "Yes, and of every judge", meaning that a person is entitled to take the opinion of every judge. This interjection is quite consistent with its being a reference to what might take place in vacation, and we think that it must have been so intended.

Re Cobbett (1) was decided in the same year. In the course of that case, in addition to the observations to which we have already referred, PARKE, B., said:

> "You can go to another court in which you have not been heard. I believe this matter has been heard in the Queen's Bench as well as here [the Court of Exchequer], but as it is an application for a habeas corpus, you are entitled to the judgment of each court and of each judge; and therefore you may go to the Court of Common Pleas. If this was the only court in which you could be heard we might then, perhaps under the circumstances, re-hear the case."

There is here the only other pre-Judicature Act reference that we can find to an applicant's being entitled to the judgment of each judge, but here again PARKE, B., may be referring only to the time when the court is not sitting.

In *Cox* v. *Hakes* (2) in the Court of Appeal under the title *Ex p. Cox* (*Bell*) ((1887), 20 Q.B.D. 1), LORD ESHER, M.R., said:

> "It was argued that, if such an appeal lies, a prisoner would be deprived of the privilege which he had under the old practice of applying, where his application for a habeas corpus was refused by one judge, to all the other judges in succession. It is not correct to say that under the old system there could be an application to all the judges in succession. There could be an application to all the courts in succession."

It is true that the decision of the Court of Appeal was reversed by the House of Lords, but none of their Lordships dissented from LORD ESHER'S statement, unless it be LORD HALSBURY, L.C., in the observations to which we have already referred. It is to be observed that neither LORD BRAMWELL nor LORD HERSCHELL subscribed to LORD HALSBURY'S observations. LORD BRAMWELL says:

(1) (1845), 5 L.T.O.S. 130.
(2) (1890), 54 J.P. 820; 15 App. Cas. 506; (1887), 20 Q.B.D. 1; 19 Q.B.D. 307.

" However, as has been said, we have got on without such appeals hitherto, and might continue to do so and thrive. I say 'without such appeals', for, with all respect, I cannot agree that going first to a judge of one court, and then, on being refused by the judge, going to a court, and, on being refused by one court, going to another, was or is an appeal. The court applied to after refusal by a judge or other court was not exercising an appellate jurisdiction in entertaining the application. It was exercising a primary jurisdiction. It need not have heard of the former application, nor known of the materials on which it was founded; and, indeed, those before it might be different from the former. If indeed such a proceeding was an appeal that appeal exists still. Clearly where the first application is to a single judge, and where to the High Court, the Lord Chancellor could grant the writ refused by them on application to him, and vice versa. Whether if one division of the High Court, before the Queen's Bench, Common Pleas, and Exchequer Divisions were fused, had refused the writ, then another division would have been bound to entertain an application for one, I know not. If yes, then the Judicature Act left the matter as it was before. Anyhow there is the possibility of a second application now as of right, so that there is the less need for an express appeal to supply the want of being able to try more than one tribunal."

LORD HERSCHELL says:

" It will be convenient, before proceeding to an examination of the section of the Judicature Act upon which this case turns, to state briefly the mode in which the courts have administered the law in relation to that writ. It was always open to an applicant for it, if defeated in one court, at once to renew his application to another. No court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question."

LORD WATSON agreed with LORD BRAMWELL and LORD HERSCHELL, and LORD MACNAGHTEN agreed with LORD HERSCHELL. LORD FIELD, who dissented, says:

" . . . it was correctly stated, as some of the noble and learned Lords who have addressed your Lordships have already pointed out, that at the time of the passing of the Act it was the undoubted right of a subject detained in custody to question by habeas the lawfulness of his detention before every one of Her Majesty's Courts in succession, without regard to the refusal to discharge by any one or more of them; and that if any one court came to the conclusion that the applicant was entitled to be discharged, no other court had any power of modification or reversal."

It is all the more noteworthy that their Lordships confined themselves in this way to the right of going from court to court having regard to their experience prior to the Supreme Court of Judicature Act, 1873. LORD BRAMWELL had been a baron of the Court of Exchequer from 1856, LORD ESHER had been a justice of the Court of Common Pleas since 1868 and LORD FIELD had been a justice of the Court of Queen's Bench.

Again, in *Secretary of State for Home Affairs* v. *O'Brien* (1) the EARL OF BIRKENHEAD, L.C., says:

> "In the course of time certain rules and principles have been evolved; and many of these have been declared so frequently and by such high authority as to become elementary. Perhaps the most important for our present purpose is that which lays it down that if the writ is once directed to issue and discharge is ordered by a competent court, no appeal lies to any superior court. Correlative with this rule, and markedly indicative in itself of the spirit of our law, is that other which establishes that he who applies unsuccessfully for the issue of the writ may appeal from court to court until he reaches the highest tribunal in the land."

So far we venture to think that the authorities cannot be said to support the principle that except in vacation an applicant could go from judge to judge as opposed to going from court to court. Nor can we trace any single instance in the books of application being made to successive judges of the same court. The only real authority to the contrary appears to be *Eleko* v. *Nigeria Government* (2), to which we have already referred. Two considerations seemed to have influenced the Judicial Committee in that case: (1) That it would be curious if an applicant could by reason of the Act of 1679 renew his application before each judge in vacation whereas in term he could make it once to the Court of Chancery and once to each of the three Courts of Common Law. We have dealt with the historical evidence in its favour, but is this so curious? An applicant is entitled to the opinion of the full court. In vacation he cannot obtain that and so he was given the right to go from judge to judge. (2) That since by reason of the Supreme Court of Judicature Act, 1873, there is only one court, the Supreme Court of Judicature, an applicant by reason of that Act would only be able to make one application, namely, to the Supreme Court, unless he also had the right to go from judge to judge.

This second reason brings us to an examination of the Judicature Acts, but before doing so we would mention that in *The State* (*Dowling*) v. *Kingston* (*No. 2*) (3), there is to be found a most illuminating judgment of FITZGIBBON, J. (with whom SULLIVAN, C.J., agreed) which considers *Eleko* v. *Nigeria Government* (2) in great detail and gives, we think, cogent reasons for thinking that LORD HAILSHAM, L.C., may have gone too far in that case.

The Supreme Court of Judicature Act, 1873, by s. 3, united into one Supreme Court of Judicature the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer and other courts not relevant to the present matter. By s. 16 the jurisdiction of all these courts and the jurisdiction which at the commencement of the Act was vested in or capable of being exercised by all or any one or more of the judges of those courts sitting in court or chambers or elsewhere, was transferred to the High Court of Justice. There was thus transferred to the High Court of Justice any jurisdiction to issue writs of habeas corpus previously vested in the common law courts and in the individual judges of those courts. Section 23 provided that subject to the Act and rules made thereunder the transferred jurisdiction should be exercised as nearly as maybe in the same manner as it might have been exercised by the respective courts from which the jurisdiction had been transferred. Section 26 abolished the division of the legal year into terms, and gave the High Court power to sit at any time. Provisions for vacations and

(1) 87 J.P. 174; [1923] A.C. 603.
(2) [1928] A.C. 459.
(3) [1937] I.R. 699.

sittings in vacation were made by s. 27 and s. 28, but the new vacations unlike the old were not periods during which the common law courts were not in general able to function. Section 31 set up five divisions of the High Court, namely, Chancery, Queen's Bench, Common Pleas, Exchequer and Probate, Divorce and Admiralty; but s. 32 authorised the Queen in Council to order the reduction or increase in the number of divisions. It was under this power that the three common law divisions were combined into a single Queen's Bench Division by Order in Council in 1880.

Section 39 conferred on single judges of the High Court such jurisdiction as was previously exercisable by single judges of the former common law courts and such other jurisdiction of the High Court as might be directed or authorised to be so heard by rules of court, while s. 40 provided that such causes and matters as were not proper to be heard by a single judge should be heard by Divisional Courts. Further, by s. 41 it was provided as follows:

> " Subject to any rules of court, and in the meantime until such rules shall be made, all business belonging to the Queen's Bench, Common Pleas, and Exchequer Divisions respectively of the said High Court, which, according to the practice now existing in the superior courts of common law, would have been proper to be transacted or disposed of by the court sitting in banc, if this Act had not passed, may be transacted and disposed of by Divisional Courts, which shall, as far as may be found practicable and convenient, include one or more judge or judges attached to the particular division of the said court to which the cause or matter out of which such business arises has been assigned . . ."

At this stage therefore the position was that subject to any rules of court a single judge of the Queen's Bench Division sitting in court or chambers could exercise in relation to writs of habeas corpus any jurisdiction which could formerly have been exercised by a single judge of any of the three common law courts, while a Divisional Court of each of the three common law divisions could exercise the jurisdiction of the former Common Law courts sitting in banc. The effect of the Order in Council in 1880 was that the Queen's Bench Division became the successor of the three courts of Queen's Bench, Common Pleas and Exchequer sitting in banc, the only differences being that any two or more judges sitting as a Queen's Bench Divisional Court should constitute and be the court sitting in banc. That being so, we think that after 1880 an applicant for habeas corpus who had been heard by a Queen's Bench Divisional Court and refused, if he applied again to a Queen's Bench Divisional Court on the same evidence was in the same position as an applicant before 1873 who made a second application to the same common law court, and could be met with the objection with which the applicant was met in *Re Cobbett* (1) : " You have been heard once: we cannot enter into this matter again."

The Supreme Court of Judicature (Consolidation) Act, 1925, did not re-enact the express provisions of s. 41 of the Act of 1873 as to the powers of the former Common Law courts sitting in banc being exercisable only by Divisional Courts. Section 63, however, provided that Divisional Courts might be held for the transaction of any business in the High Court ordered by rules of court to be heard by a Divisional Court and that Divisional Courts for the purpose of the matters to be heard by them should exercise all or any part of the jurisdiction of the High Court which included all the jurisdiction formerly exercised by the

(1) (1845), 5 L.T.O.S. 130.

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three Common Law courts. Finally by R.S.C., Ord. 59, r. 1 and r. 14, the jurisdiction of the High Court in relation to habeas corpus was directed to be exercised either by a single judge or by a Divisional Court.

We do not think that this altered the position of a Queen's Bench Divisional Court when sitting to hear applications for habeas corpus. It still is the successor of the three Common Law courts sitting in banc, its decision is equivalent to the decision of all the judges of the division just as the decision of one of the old Common Law courts sitting in banc was the equivalent of the decision of all the judges of that court.

We know of no case since 1880 in which an application based on the same grounds and the same evidence has been renewed before a Divisional Court consisting of different judges of the Queen's Bench Division. Nor are there to be found any dicta in support of the making of such an application unless it be in *Ex p. Chapple* (1), in which DENNING, L.J., said: "The only remedy of the subject is to go before another Divisional Court or another judge . . ." It may be that he was referring to a Divisional Court of another Division, but if he meant a Divisional Court of the Queen's Bench Division consisting of different judges we think that he was wrong.

We hold, therefore, that the applicant having already once been heard by a Divisional Court of the Queen's Bench Division is not entitled to be heard again by another Divisional Court of the same division.

That is sufficient to dispose of the present case. Although it has been necessary for the purpose of ascertaining the nature of the jurisdiction exercised today by the Divisional Court in matters of habeas corpus to canvass the historical justification for the view expressed by the Judicial Committee in *Eleko* v. *Nigeria Government* (2), it is not necessary for the decision of the present application for us to express any concluded opinion as to the extent of an applicant's right today to go from judge to judge as distinct from going from Divisional Court to Divisional Court of the Queen's Bench Division. *Eleko* v. *Nigeria Government* (2) has remained unquestioned—except in the Irish case to which we have referred—for thirty years, and there are parallel decisions in Canadian and Australian courts. In a matter so important to the liberty of the subject we would not lightly disregard the principles there laid down and their correctness can be left for consideration until a case arises in which they are directly in point.

We would only repeat, in conclusion, what LORD GODDARD has so often said, that there should be an appeal to the House of Lords in criminal matters where the writ of habeas corpus has been refused. This case is just the case in which a ruling by the highest tribunal in the land is required.

Application dismissed.

[An order for costs in a nominal amount, e.g., £1, was sought by the respondent and was refused. No order was made as to costs.]

Solicitors: *Official Solicitor*; *Treasury Solicitor.*

T.R.F.B.

(1) (1950), 66 (pt. 2) T.L.R. 932.
(2) [1928] A.C. 459.

COURT OF APPEAL

(JENKINS, ROMER AND WILLMER, L.JJ.)

LONDON COUNTY COUNCIL *v.* CENTRAL LAND BOARD

October 3, 6, 27, 1958

Town and Country Planning—Development value—Determination—Estate acquired for building purposes—Planning permission for development of whole land—Heavy expenditure necessary to develop part of land—No development value if whole land developed—High value if part only developed—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 70.

A county council acquired certain land and obtained planning permission to develop the whole of it as a housing estate. Most of the land was suitable for building houses, but on part of it heavy expenditure, exceeding the value of the land as a whole for building purposes, was necessary before houses could be built there. If this part were not developed at all and the rest of the land were developed as permitted, the increase in the value of the land as a whole due to the permission to build would be £22,500. The Central Land Board contended that the county council was at liberty to carry out the development so far as it was profitable and was not obliged to develop the whole of the land, and, accordingly, claimed a development charge of £22,500.

HELD: the development charge must be assessed on the footing that all the permitted development would be carried out, and, as the value of the land as a whole would not be increased if this were done, no development charge was payable.

PER CURIAM: Practice Notes on the working of the Act provided by the Board for its officers are wholly inadmissible for the purpose of construing the Act, and so should neither be considered by the court nor allowed by the court to be read as part of counsel's argument.

QUAERE: whether the manifestation by a developer to carry out part only of the development for which planning permission had been given would be a ground for the revocation of such permission under s. 21 (1) of the Act.

APPEAL by the Central Land Board from the decision of DANCKWERTS, J. (1958), 122 J.P. 288, that development charge was not payable in respect of an estate of 231 acres, which was acquired by the London County Council under the Housing Act, 1936, and was to be developed as a building site, on the ground that, in assessing the amount of development charge, regard must be had to the land as a whole and, so regarded, the relevant increase in value of the land was nil.

Squibb, Q.C., and *Buckley* for the Central Land Board.
H. E. Francis for the London County Council.

Cur. adv. vult.

Oct. 27. **JENKINS, L.J.,** read the following judgment of the court. This is an appeal by the Central Land Board from a judgment of DANCKWERTS, J., dated Mar. 12, 1958, on an application by originating summons on the part of the London County Council as plaintiff against the Central Land Board as defendant for the purpose of determining whether, upon the true construction of the Town and Country Planning Act, 1947, and the Town and Country Planning (Development Charge) Regulations, 1948, any, and if so what, development charge was payable by the council in respect of the development of its Sheerwater estate comprising an area of some 231 acres near Woking in the county of Surrey. The relief sought by the council and granted by the learned judge took the form of a declaration upon the true construction of the Act and regulations, to which we have referred:

" That for the purpose of determining whether any and if so what development charge is to be paid in respect of the operations carried out by the

plaintiffs on land forming the major part of the plaintiffs' Sheerwater estate at Woking in the county of Surrey pursuant to the Surrey County Council's planning permission dated Nov. 28, 1949 (reference T.P. 3/WOK. 3743), and the Woking Urban District Council's planning permission dated Mar. 31, 1952 (reference T.P. 3/No. 5275), the defendants ought to value the said land with the benefit of the said planning permissions on the footing that the plaintiffs would proceed to carry on the whole of the said operations within a reasonable time."

It is agreed that the effect of this declaration is to reduce the amount of the development charge to nil.

By its notice of appeal the Board seeks the substitution for the declaration made by the learned judge of a declaration:

"That upon the true construction of the said Act and regulations for the purpose of determining as aforesaid the defendants ought to value the said land with the benefit of the said planning permissions on the footing that any developer thereof would be at liberty to carry out the development authorised by the said planning permissions in such stages and at such times as he might choose."

It is agreed that under a declaration in these terms the development charge would properly be assessed at £22,500.

The facts before the court, which might with advantage have been amplified in certain respects, are contained in an affidavit by Mr. Toole, the valuer to the London County Council, and the exhibits thereto. He says:

"The council is the owner in fee simple of a housing estate situated and known as the Sheerwater estate at Woking in the county of Surrey, which contains an area of about 231 acres. This estate was acquired by the council under the provisions of Pt. V of the Housing Act, 1936, partly by agreement and partly in pursuance of compulsory powers conferred by the County of London (Woking, Surrey) Extension Order, 1951. The greater part of the estate at the time of purchase consisted of woodland, scrub and underwood, with two small cottages used by keepers. The estate as at the date of purchase is delineated and coloured pink on the plan now produced and shown to me and marked 'J.E.J.T.1'. (3) The council obtained planning permission from the Surrey County Council for the development of the estate, excluding part of the industrial land, in November, 1949 and obtained planning permission from the Woking Urban District Council (acting on behalf of the Surrey County Council) for the development of the whole of the industrial land in March, 1952. (4) In November, 1951, the council applied to the Central Land Board for the assessment of the development charge on the whole of the estate, excluding certain small portions which were exempt from development charge or excluded by agreement with the Board, and in consideration of an undertaking given by the council to pay the development charge when determined, the Board gave their consent to the council proceeding with the development before actual payment of the charge. With the exception of the industrial land, the development of the estate was substantially completed before Nov. 18, 1952. (5) By reason of the physical condition of the land the council were compelled to incur very heavy expenditure on site works and in particular on culverting a water-course known as the Rive Ditch which passed through the land and which took surface water from the town of Woking. In addition, the council had to make a substantial contribution to the Surrey County Council pursuant

to the provisions of the Surrey County Council Acts, 1925–1936, towards the cost of improving a further length of the Rive Ditch outside the boundary of the estate. The total cost of these works was considerably in excess of the value of the land as a whole for building purposes. (6) In those circumstances a difference arose between the council and the Board as to the basis on which the development charge should be assessed. The council contended that on the true construction of the Town and Country Planning Act, 1947, and the Town and Country Planning (Development Charge) Regulations, 1948 (S.I. 1948, No. 1189), for the purpose of determining whether any and what development charge was payable, the Board ought to value the land on the footing that the council would carry out the whole of the operations authorised by the planning consents within a reasonable time, in other words, that the whole of the land should be valued with the benefit of the planning consents as one unit of development; and on that footing it was contended by the council that the land could have no development value for the approved planning purposes and that therefore the development charge should be assessed as ' nil '. On the other hand, the Board contended that, whilst the assessment is to have regard to the effect on the value of the relevant land of the right to carry out the development authorised by the planning permission, there is no statutory provision which requires, or requires it to be assumed for this purpose, that development in accordance with the permission must be begun or completed within any given period of time. Accordingly, in the Board's view, on a proper construction of the Town and Country Planning Act, 1947, and of the above mentioned regulations, it is proper for the Board to assess the development charge having regard to the increase in value conferred by the planning permission as at the date of the assessment on the footing that any developer would be at liberty to carry out the development in such stages and at such times as he might choose."

In his affidavit Mr. Toole re-states the Board's contention in slightly different language which is criticised in an affidavit in answer by Mr. Stedman, the district valuer, but nothing turns on this as it is clear that the declaration made by the learned judge and the substituted declaration now sought by the Board sufficiently define the competing views, and that the parties are agreed that the council's view must result in a nil assessment while the Board's view should be taken as producing an assessment of £22,500. Mr. Stedman does not traverse Mr. Toole's evidence in any other respect.

The statutory provisions bearing directly on the question to be decided are contained in Pt. VII of the Act of 1947 and in the regulations of 1948 (S.I. 1948 No. 1189), made under s. 70 (3) of the Act, but it will be convenient to begin by referring briefly by way of introduction to some of the earlier sections. Section 12 (1) lays down the basic principle that

> " . . . permission shall be required . . . in respect of any development of land which is carried out after the appointed day."

Section 12 (2) defines " development " as meaning

> " the carrying out of building . . . or other operations in, on, over or under any land, or the making of any material change in the use of any buildings or other land."

Section 14 (1) provides that

> " . . . where application is made to the local planning authority for permission to develop land that authority may grant permission either

unconditionally or subject to such conditions as they think fit, or may refuse permission . . ."

Section 16 (1) gives a right of appeal to the Minister where permission is refused or granted subject to conditions. By s. 18 (4):

"Where permission to develop land is granted under this Part of the Act, then, except as may be otherwise provided by the permission, the grant of permission shall enure for the benefit of the land and of all persons for the time being interested therein, but without prejudice to the provisions of this Part of this Act with respect to the revocation and modification of permission granted thereunder."

By s. 21 (1):

"Subject to the provisions of this section, if it appears to the local planning authority that it is expedient, having regard to the development plan and to any other material considerations, that any permission to develop land granted on an application made in that behalf under this Part of this Act should be revoked or modified, they may by order revoke or modify the permission to such extent as appears to them to be expedient as aforesaid: Provided that no such order shall take effect unless it is confirmed by the Minister, and the Minister may confirm any order submitted to him for the purpose either without modification or subject to such modifications as he considers expedient."

Section 23 confers on local planning authorities certain powers of enforcement in cases in which development has been carried out without permission or any conditions subject to which permission was granted have not been complied with. Part VI of the Act (beginning with s. 58) contains provisions with regard to the payment of compensation for the depreciation of land values by reason of the restrictions imposed by the Act, the basis of compensation (to put the matter very shortly) being the "development value" represented by the difference between the restricted and unrestricted values (as defined in s. 61) of any given interest in land and the aggregate amount available for this purpose being limited to £300,000,000. Part VII of the Act contains the sections bearing directly on the present question, and we should quote them at some length. By s. 69 (1) and (2) (omitting a proviso to the latter sub-section on which nothing turns):

"Subject to the provisions of this Act, there shall be paid to the Central Land Board in respect of the carrying out of any operations to which this Part of this Act applies, and in respect of any use of land to which this Part of this Act applies, a development charge of such amount (if any) as the Board may determine, and accordingly no such operations shall be carried out, and no such use shall be instituted or continued, except with the consent in writing of the Central Land Board, until the amount of the charge (if any) to be paid in respect of those operations or that use has been determined by the Board in accordance with the provisions of this part of this Act, and the Board have certified that the amount so determined has been paid or secured to their satisfaction in accordance with those provisions. (2) This Part of this Act applies to all operations for the carrying out of which planning permission under Pt. III of this Act is required, and to all uses of land for the institution or continuance of which such permission is so required."

Section 70 contains the following material provisions:

" 70 (1) Subject as hereinafter provided, the Central Land Board shall, on application being made to them in the manner prescribed by regulations under this Act by a person having an interest in land sufficient to enable him to carry out any such operations as aforesaid or to make any such use as aforesaid, or by a person who satisfies them that he is able to obtain such an interest, determine whether any and if so what development charge is to be paid in respect of those operations or that use: Provided that (a) where planning permission under Pt. III of this Act has not been granted for the carrying out of the said operations or for the institution or continuance of the said use, the Board may postpone the determination of the development charge to be paid in respect thereof until such permission has been granted; (b) where the application relates to the carrying out of any operations, the Board may refuse to determine the development charge payable in respect thereof unless they are satisfied, after consultation with the local planning authority, that the applicant is able to carry out those operations, and that he will do so within such period as the Board consider appropriate; (c) where the application relates to the institution of any use of land, the Board may refuse to determine the amount of the charge in respect thereof unless they are satisfied, after consultation with the local planning authority, that the use will be instituted within such period as the Board consider appropriate. (2) In determining whether any and if so what development charge is to be paid under this Part of this Act in respect of any operations or any use of land, the Board shall have regard to the amount by which the value of the land with the benefit of planning permission for those operations or that use (calculated without regard to any charge payable in respect thereof under this Part of this Act and on the assumption that the operation or use can lawfully be carried out or made apart from the provisions of this Act) exceeds the value which it would have without the benefit of such permission, and shall not give any undue or unreasonable preference or advantage to one applicant over another. (3) Subject to the provisions of the last foregoing sub-section, regulations made under this Act with the consent of the Treasury may prescribe general principles to be followed by the Central Land Board in determining under this Part of this Act whether any and if so what development charge is to be paid thereunder in respect of any operations or use of land, and without prejudice to the generality of the foregoing provision, such regulations may in particular provide for securing that the amount of the said charge shall be determined on different principles in relation to operations or uses of different classes, or in relation to operations or uses carried out or begun at different periods."

By s. 72 (1):

" Subject as hereinafter provided, a determination of the Central Land Board under this Part of this Act in respect of any operations or use of land shall have effect in relation to the carrying out of those operations, or, as the case may be, in relation to that use of the land, by any person for the time being interested therein and the question whether any and if so what development charge is to be paid under this Part of this Act in respect of any such operations or use shall be determined accordingly: Provided that the Board may, if they think fit, direct that any such determination as aforesaid shall cease to have effect if, before the operations to which the determination relates are carried out or completed, or as the case may be, before the use to which it relates is instituted, any interest in the land is transferred or created (otherwise than by operation of law), unless the

determination is confirmed by the Board with or without modifications, on a subsequent application made to them in that behalf."

The Town and Country Planning (Development Charge) Regs., 1948 (S.I. 1948 No. 1189) duly made under s. 70 (3) of the Act, include the following provisions, which are contained in Pt. II of the regulation headed "General" and in the schedule:

"(2) Subject to the provisions of the Act and of any regulations made thereunder and for the time being in force, the general principles set out in the schedule to these regulations shall be followed by the Board in determining under Pt. VII of the Act whether any, and if so what, development charge is to be paid thereunder in respect of any operations or use of land."

Then the schedule:

"(1) Development charge shall be determined so as to secure, so far as is practicable, that land can be freely and readily bought and sold or otherwise disposed of in the open market at a price neither greater nor less than its value for its existing use. This object is the governing principle by which the Board are to be guided in determining development charge. (2) Development charge shall not be more than the amount which, to the satisfaction of the Board, represents the additional value, measured by normal processes of valuation, of the land due to planning permission for a particular development. (3) Development charge shall not be less than the amount referred to in para. (2) of this Schedule, unless in the opinion of the Board the charge ought properly to be less in order to comply with the governing principle."

We need not refer to the last paragraph, (4), of the schedule. We add a reference to s. 102 which provides by sub-s. (1) (inter alia) that an application to the Central Land Board for the making of any determination under Pt. VII of the Act shall be made in such manner as may be prescribed by regulations under the Act and shall include such particulars as may be required by the regulations or by any directions given by the Board thereunder. The Town and Country Planning (Making of Applications) Regulations, 1948 (S.I. 1948 No. 711) include the following with respect to applications to the Board. Regulation 3 provides:

"(1) An application to the Board to determine whether any and, if, so, what development charge is to be paid in respect of any operations or use of land shall be made on a form issued by the Board for the purpose and obtainable either from the Board or from any authority with whom an application for planning permission may be lodged under the preceding regulation. (2) Such application to the Board shall contain such particulars and shall be accompanied by such plans, drawings and other documents as may be required by any directions of the Board to enable them to determine whether any kind and, if so, what development charge is to be paid."

Then there is a proviso which we need not refer to.

We should next make some reference to the documents granting the London County Council planning permission for their proposed development of the Sheerwater estate. We refer first to the permission granted by the Surrey County Council. That is addressed to the Director of Housing and Valuer, London County Council, and is in these terms:

"The Surrey County Council as local planning authority under the provisions of Pt. III of the Town and Country Planning Act, 1947, do hereby signify in writing their approval in principle subject to the conditions (if any) specified in the second schedule hereto, of the application for permission

for the development specified in the first schedule hereto deposited by you on August 18, 1949."

Then the first schedule says:

"Housing, buildings ancillary to housing. Industry, open space, school sites, etc., as indicated on plan reg. No. HA/1908/49 as amended by revised layout shown on plan reg. No. HA/3496/49, on approximately 210 acres of land at Sheerwater Estate, Woking."

The second schedule contains certain conditions:

"(1) Provision of a further five acres at least of land for industrial development either on or adjoining Sheerwater estate. (2) The adjustment of the boundaries of the school sites."

Then:

"The reasons for the decision of the Council to grant permission for development subject to compliance with the conditions specified in the second schedule hereto are: (1) That the area already set aside for industry on land adjoining the estate, together with the additional area proposed in the revised layout plan cannot provide the employment which it is estimated the estate will need because of the industrial development already approved by government departments in respect to a large proportion thereof. (2) To meet the requirements of the Surrey County Council as education authority."

The document is signed by the clerk of the council. We should observe on that that the plans referred to comprise a detailed and carefully balanced lay-out of the whole area so as to provide not merely housing accommodation, providing homes of different sizes and types in suitable proportions, but also sites for industry to ensure employment for the occupants of the houses, shops, schools, a church or churches, a community centre, open space and recreation grounds, and other amenities. The permission granted by the Woking Urban District Council is mutatis mutandis in form similar to the document in the case of the Surrey County Council, and the plan referred to comprises the industrial area shown on the Surrey County Council's plans and indicates the course and dimensions of the accommodation road to be constructed upon it. We do not think it is necessary for the present purpose to refer in any greater detail to that permission.

We can now turn to the arguments presented to us. Counsel for the Board puts his case in this way. Founding himself on s. 70 (2) of the Act, together with the general principles set out in the schedule to the regulations made under sub-s. (3) of that section, he says that the Board is required to assess the development charge payable in any given case at a figure representing the amount by which the value of the land in question, with the benefit of planning permission for the relevant development, exceeds the value it would have without the benefit of such permission, and that such additional value must be measured by normal processes of valuation. He points out that planning permission merely permits the owner of land to develop it in a particular way and does not place any obligation on him to carry out the development, but leaves him free to carry it out to the extent (if any) to which he may choose to do so. He says further that the normal processes of valuation which are to be applied involve a hypothetical sale in the open market of the land in question with the benefit of the relevant permission, which under s. 18 (4) is to enure "for the benefit of the land and of all persons for the time being interested therein". The question then is, according to counsel for the Board, how much any potential purchaser

would be prepared to pay for the land with the benefit of the permission if it was put up for sale in circumstances enabling every possible purchaser to make his offer or bid. He says that the range of hypothetical purchasers should be taken as including everyone likely to be in the market, and in particular commercial developers wishing to buy the land with a view to making the largest possible profit out of it, and cites for the principles to be applied in ascertaining market value by reference to a hypothetical sale, *Inland Revenue Commissioners* v. *Clay* (1) and *Sri Raja Vyricherla Narayana Gajaptiraju* v. *Revenue Divisional Officer, Vizagapatam* (2). The market value of the land with the benefit of the permission having been ascertained in this way, it only remains on the Board's view of the matter to deduct the existing use value, when the balance will represent the amount properly exigible in respect of the development charge.

Counsel for the Board does not dispute that no hypothetical purchaser reasonably imaginable could be expected to pay any more than the existing use value, or, indeed, to make any payment at all, for the land on the footing that he was to be obliged to carry out in its entirety the costly scheme of development for which permission was granted, but he says that inasmuch as planning permission involves no such obligation, there is no warrant for this assumption, and the range of hypothetical purchasers must be taken to include persons seeking to purchase with a view to developing such parts of the land as could be profitably developed and leaving the rest undeveloped, in which case it is agreed that the appropriate addition to the existing use value would be £22,500. Apart from the rest of notional sale, counsel for the Board submits that the London County Council, if so minded, instead of carrying out in its entirety the development of the whole estate contemplated by the planning permission, as was in fact done, could itself have confined its operations to such parts of the estate as could profitably be developed, leaving the rest as it was, and either selling or retaining it in its undeveloped state as might be found expedient. In that case, says counsel for the Board, it could not be denied that the planning permission would have resulted in the enhancement of the existing use value of the estate by the agreed figure of £22,500.

It is said on the Board's side that the contrary view would mean that the London County Council having bought the estate at its existing use value, and its predecessors in title having been compensated out of public funds for the development value of which they have been deprived, the London County Council would have acquired the benefit of the planning permission at no additional cost; whereas if the London County Council had bought before the Act it would have paid the existing use value plus the additional value attributable to the unrestricted rights of user then enjoyed. This result is said to be inconsistent with the scheme of the Act. The essence of the Board's argument in its shortest form may, we think, be said to be that the value of the planning permission was not its value to the London County Council for the purposes of the unprofitable scheme of development it had chosen to adopt, but its value to any possible purchaser. The Board concedes that in so valuing the benefit of the permission the parts of the estate which were incapable of profitable development should be left out of account, that, indeed, being the process by which the agreed figure of £22,500 was arrived at. But the Board says that it cannot be right to set against that figure the deficit attributable to the development of the unprofitable parts, which would be tantamount to treating the unprofitable parts as less valuable with planning permission than they were without it, quod est absurdum.

(1) [1914] 3 K.B. 466.
(2) [1949] 2 All E.R. 317; [1939] A.C. 302.

Counsel, for the London County Council, in the first branch of a two-fold argument, emphasises the balanced and integrated character of the development for which planning permission was granted, and says that the permission was manifestly sought and obtained on the footing that the Sheerwater Estate as a whole would in fact be developed in the manner indicated on the plans. He says that the development by the London County Council of parts only of the estate, selected by reference to economic considerations, would have involved a radical departure from the proposals on the strength of which permission was granted. He goes so far in this branch of this argument as to submit that partial development would not be within the permission at all. We think that puts this part of his case too high. It is difficult to see how the carrying out of part of the development permitted could be said to be in itself outside the permission merely on the ground that the remainder of the entire scheme was not contemporaneously carried out. But it does appear to use that, if the London County Council had manifested a definite intention only to carry out specified parts of the entire development, there might well have been a case for revocation under s. 21 (1) of the Act. Counsel for the London County Council also suggests that the carrying out of the entire development could be classed as a condition within the meaning of s. 14 (1), breach of which would have provided a case for applying the enforcement procedure prescribed in s. 23. We cannot accept this view, as it appears to us that the provisions of the Act in regard to the imposition of conditions (including as they do a right of appeal to the Minister under s. 16) and also the provisions of the Town and Country Planning (General Development) Order, 1948, on the same matter (see art. 5 (4) and Pt. II of the second schedule) are confined in their operation to express conditions, and there is no express condition in the present case to the effect that the permitted development must be carried out in its entirety. We do, however, attach some importance to the risk of revocation under s. 21 (1), which would apply equally to a hypothetical purchaser of the estate from the London County Council—see s. 18 (4). This part of counsel for the London County Council's argument thus appears to us to justify the comment that the expedient of selective development which the Board seeks to bring into the calculation, if in fact adopted, would have been a breach of faith on the part of the London County Council and might have exposed the London County Council or any hypothetical purchaser from the London County Council to some risk of revocation of the permission.

It is obvious that the London County Council would never in fact have acted in this way, and it seems to us extremely improbable that a hypothetical purchaser, once apprised of the comprehensive scheme of development contemplated by the planning permission, would have been prepared to buy the benefit of the planning permission at a price based on the assumption that he could successfully repel any proceedings for revocation which might be brought against him under s. 21, and would moreover find it possible to keep his development of selected parts of the estate strictly within the four corners of the comprehensive scheme of development for which permission had been granted. There is, we think, considerable force in the argument that the Board's claim to assess the development charge on the basis of the selective development of parts only of the estate, and not on the basis of development of the whole in accordance with the comprehensive scheme of development for which permission was granted, should be rejected on those grounds.

However, the matter does not rest there. It remains to consider the second, and, as we think, the more powerful, branch of the argument of counsel for the London County Council, which is to the following effect. He points out that the development charge is exigible in respect of actual operations in the way of

development, and not in respect of mere permission to develop. Thus under s. 69 (1)

> " there is to be paid to ' the Board ' in respect of the carrying out of any operations to which this Part of this Act applies a development charge . . ."

The same sub-section prohibits the carrying out of any such operations, save with the consent of the Board, until the amount of the development charge (if any) to be paid in respect of those operations has been determined, and paid or secured to the satisfaction of the Board. Under that provision the Board can insist on the amount of the charge being determined and paid or secured before the operations are carried out, but it is nevertheless in respect of the carrying out of the operations and not in respect of mere permission to carry them out that the charge is exigible. Then under s. 70 (1) on application in due form by " a person having an interest in land sufficient to enable him to carry out any such operations as aforesaid ", the Board is to determine the amount, if any, of the development charge to be paid " in respect of those operations ". That is a clear indication that the development charge is exigible in respect of actual, not hypothetical, operations the requirement as to the sufficiency of the applicant's interest in the land being designed to ensure that he is in that respect at least able actually to carry them out. Proviso (a) to sub-s. (1) of s. 70 is another indication that the development charge is exigible in respect of actual operations and not in respect of the grant of planning permission, for it carries the implication that the Board might determine and collect the development charge in respect of operations carried out without planning permission, though no doubt the Board normally would and should, as the proviso enables it to do, postpone consideration of the matter pending the grant of planning permission. Proviso (b) to s. 70 (1) is of the first importance to this branch of Mr. Francis's argument. It enables the Board to refuse to determine the development charge payable in respect of any operations unless satisfied after consultation with the local planning authority

> " that the applicant is able to carry out those operations, and that he will do so within such period as the Board consider appropriate."

Notwithstanding counsel for the Board's submissions to the contrary, that seems to us to afford a plain indication that the development charge is to be ascertained on the footing that the operations in respect of the carrying out of which the charge is exigible will in fact be carried out.

Next comes sub-s. (2) of s. 70 on which counsel for the Board principally relies. That sub-section enjoins the Board in determining whether any and, if so, what development charge is to be paid " in respect of any operations " to

> " have regard to the amount by which the value of the land with the benefit of planning permission for those operations . . . exceeds the value which it would have without the benefit of such permission."

Read in isolation, that language may be said to afford literal support for counsel for the Board's view. But counsel for the London County Council submits, in effect, that read in conjunction with the other provisions of the Act relating to development charges to which we have referred, s. 70 (2) is not inconsistent with but supports his argument, and we agree with that submission. Having regard to what has gone before, the words " in respect of any operations " must clearly mean " in respect of the carrying out of any operations ". " The land " can only mean the entirety of the land on which the operations in question are to be carried out, and the " operations " referred to can only mean the totality of the operations, the development charge (if any) in respect of the carrying out of

which is to be ascertained. Thus the Board is in effect told that in determining the development charge (if any) payable in respect of the carrying out of any operations, it is to have regard to the amount by which the value of the entirety of the land on which the operations in question are to be carried out, with the benefit of planning permission for the whole of those operations, exceeds the value which it would have without the benefit of such permission, on the footing that the whole of such operations will in fact be carried out. The qualification introduced by the words " on the footing that " is, we think, well warranted by the context. Substitution of the alternative qualification " whether those operations or any of them are ever in fact carried out or not " would involve the determination of the amount of a charge exigible in respect of the carrying out of operations by reference to a formula based on the assumption that they might not be carried out at all, a curious result indeed, and, as we think, inconsistent with proviso (b) to s. 70 (1).

We should next refer to the Development Charge Regulations, 1948. Paragraphs (2) and (3) of the schedule adopt as the normal measure of the development charge " the additional value . . . of the land due to planning permission for a particular development ". Here again we agree with counsel for the London County Council. We think " the land " means the entirety of the land on which the operations in question are to be carried out, or, to use the words of para. (3) of this schedule, to which " the particular development " relates. Thus, in the present case " the land " is the London County Council's Sheerwater Estate, while the " particular development " must surely be the entirety of the scheme of development for which planning permission was granted by the Surrey County Council and the Woking Urban District Council. Did the grant of planning permission for the particular development comprised in that scheme add anything to the value of the Sheerwater Estate as a whole? On the footing that the scheme was to be carried out in its entirety, the answer must admittedly be " no ". The phrase " particular development ", to our minds, suggests actuality. Moreover, it must, we think, in the context afforded by the Act mean an operation or combination of operations in respect of the actual carrying out of which development charge is to be paid. If that is right, we think the formula contained in para. (2) of the schedule to the regulations must, like the formula contained in s. 70 (2), be taken as assuming that the whole of the development in question will in fact be carried out.

We would add a brief reference to the form of application " D.1 " mentioned above. This form has statutory sanction, and nos. 4 and 6 of the questions to be answered by applicants are in these terms:

> "Question 4: State (a) the nature of the development proposed; (b) the date it is intended to start; (c) the date it is intended to finish. Question 6: (a) Do you wish the Board to determine whether any, and if so what, development charge is payable in respect of the whole of the development for which planning permission has been granted or is deemed to have been granted? (b) If not, specify that part of the development for which you wish the charge to be determined."

The terms of no. 4 clearly assume that the operations with which the development charge is concerned are actual operations which will in fact be carried out. The terms of no. 6 (a), with their reference to the charge payable

> " in respect of the whole of the development for which planning permission has been granted . . .",

seem to involve recognition of the applicant's right to have the development charge assessed on the land as a whole in respect of the carrying out of the

entirety of the operations in respect of the carrying out of which the development charge is to be paid.

The learned judge allowed counsel for the London County Council to read as part of his argument certain Practice Notes on the working of the Act provided by the Board for the assistance of its officials. In our judgment these notes are wholly inadmissible for the purpose of construing the Act, and the learned judge should have declined to consider them. We do not think it a desirable practice to allow inadmissible matter of this kind to be read as part of counsel's argument in a case involving the construction of statutory provisions. Such notes inevitably derive persuasive force from the fact that they represent the views of the persons charged with the administration of the Act, and, therefore, possessing special knowledge of its provisions, and however much counsel may disclaim reliance on them otherwise than as part of his argument, their use may well result in the court being influenced by official opinion, albeit unconsciously, on questions of construction, the decision of which properly rests with the court alone, We have, therefore, entirely ignored those Practice Notes, which should never have been brought into the discussion at all. But, while venturing this criticism of the use made of the Practice Notes, we think that for the reasons we have endeavoured to state, the learned judge came to a right conclusion in this case, and we would dismiss the appeal.

Appeal dismissed.

Solicitors: *Treasury Solicitor*; *Solicitor, London County Council.*

H.S.

COURT OF APPEAL

(LORD SOMERVELL, MORRIS AND PEARCE, L.JJ.)

November 17, 18, 1958

HENRY BOOT & SONS, LTD. *v.* LONDON COUNTY COUNCIL

Building Contract—Rise and fall clause—"Rates of wages"—"Wages"—Weekly sums credited to each employee of contractor each week, payable as lump sum holiday money.

A local authority entered into a building contract which provided that "if during the currency of this contract (a) the rates of wages payable for any labour employed in the execution of the works shall in conformity with agreements between associations of employers and trade unions be increased above or decreased below the corresponding rates in force at the date of the contractor's tender", the contract price should be varied accordingly. During the currency of the contract the amount set aside each week under an agreed holiday scheme by the contractor for each of his employees (which amounts could be drawn by the employee as a lump sum when he took his holiday) was increased.

HELD: the sums so set aside, being weekly sums which had to be credited to the employee each week, were within the expression "rates of wages", and so the increase entitled the contractor to vary the contract price.

APPEAL by the plaintiff, a building contractor, from the decision of PILCHER, J., dated Dec. 17, 1957, dismissing his claim against the defendant local authority under a building contract for the sum of £1,112 2s. 9d., being the amount of the increase during the currency of the contract in the amount of holiday money credited by the contractor to his employees due to an increase in the rates of such holiday money. PILCHER, J., held that the phrase "rates of wages" in the rise and fall clause of the building contract did not cover these credits of holiday money.

Stewart-Brown, Q.C., and *Gardam* for the contractor.

M. R. Hoare for the employers.

LORD SOMERVELL: This is an appeal from the decision of PILCHER, J., which raises a point of construction, and I think a difficult one; and the court is much indebted for the arguments of counsel on each side.

It arises in this way. There was a building contract between the two parties, the plaintiff contractor and the defendant employers, which contained a clause providing for a certain extra sum to be paid to the contractor in circumstances which will emerge when I read the clause. The material words of the clause are these:

> " 23A. If during the currency of this contract (a) the rates of wages payable for any labour employed in the execution of the works shall in conformity with agreements between associations of employers and trade unions, or with the decisions of a competent authority, be increased above or decreased below the corresponding rates in force at the date of the contractor's tender . . . and the increase or decrease shall result in an increase or decrease of cost to the contractor in carrying out the works, then an allowance equivalent to the net increase or decrease of cost . . . as certified by the architect shall, subject to the provisions hereinafter contained, form an addition to or deduction from the amount otherwise payable under this contract."

The question is whether certain sums which arise under the scheme operated by the Building and Civil Engineering Holidays Scheme Management, Ltd., fall within the words of that clause. Broadly speaking, the idea of this holidays scheme is that a sum is put aside each week for each employee who is then able, when the time comes for him to take his holidays, to draw out the amount standing to his credit. The question, put shortly, is whether the sum credited to the employees under the provisions which I will read in a moment are within the clause which I have just read so that the contractor is entitled to demand payment if those holiday sums are increased, as they were in the present case.

There is no doubt that this scheme applies, and that it falls within the words " agreements between associations of employers and trade unions ". Paragraph 2 of the annual holidays scheme says this:

> " In respect of holidays, each operative covered by the scheme shall from the calendar week beginning on the first Monday after the appointed day (as defined in cl. 15 hereof) be credited by the employer first employing him in that calendar week, and by the employer first employing him in each subsequent calendar week with the sum of 2s., except in the case of persons (male or female) under the age of eighteen years, when the sum shall be 1s. 6d."

There are various other provisions, to one or two of which I may refer later in this judgment, but that sets out the general nature of the payments in question.

Now if those weekly sums are increased, is that an increase in the " rates of wages payable for any labour employed " ? The learned judge decided that it was not, for reasons to which I will refer later. He relied on another clause in the contract which, with respect, I do not think is of real assistance in solving the problem which we have to solve. It is said, on the one hand, that these are weekly sums; they are credited to workmen, and therefore prima facie are, or might be said to be, included in their " rates of wages ". What the employee gets at one time is £x plus 2s. 3d., and another time £x plus 4s. 6d. Therefore, it is said that his " rate of wages " has gone up. On the other hand, it is submitted on behalf of the employers that the words are inapt to cover credits of this kind. It is said that " rates of wages " means only the ordinary wages in the ordinary sense; and counsel on behalf of the employers quite rightly drew our attention to a number of provisions in the scheme itself:—in what is called the Working Rule Agreement agreed by the London Regional Joint

Committee and approved by the National Joint Council for the Building Industry, which is admittedly incorporated, and can be looked at. In all these provisions, as he said, a distinction is drawn between holiday payments, and what I would describe as " wages ", at any rate in the narrower sense of rates per hour, and so on.

I do not propose to go through the various provisions, to which counsel quite rightly drew our attention, differentiating between the holiday payments, and what I call (without begging the question) " wages " in the narrow sense, because I accept his submission that they arise under different documents, and are dealt with in different ways. The question is whether they are within the expression " rates of wages " in cl. 23A of the agreement. That clause is dealing with increases or decreases in the rates of wages; and I have come to the conclusion that a weekly sum which has to be credited to a man each week is within the expression " rates of wages " in this clause. It is not a point which is capable of much elaboration; but if there is an increase in the amount by which each employee is credited at the beginning of each week in respect of this holiday scheme, it seems to me natural enough, for the purpose of this clause at any rate, to say that the " rates of wages " in respect of him have been increased.

The learned judge relied on another clause in the contract, cl. 59; and it was pointed out that that was an optional clause in the sense that, although this contractor adopted it, it was a clause which might not be adopted in other contracts in this general form. I do not myself think that that is very important, but I will read the clause, and then say why I do not think it really helps. The clause is this:

> " The contractor shall be paid in respect of all day work ordered by the architect [that, we were told, meant small variations] at the rates of wages actually and properly paid to the persons employed on such work but not exceeding the rates which at the time of the execution of the work have been established (by machinery of negotiation or arbitration) for the trade or industry in the district where work is carried out . . . with the addition thereto of the first percentage inserted by the contractor in his tender/quotation (namely, fifteen per cent.) to cover supervision, use of plant, machinery, profit, all employers' contributions to national insurance, payment for holiday wages and all contingencies."

The learned judge said that as " rates of wages " in that clause expressly excluded payment of holiday wages, he thought it right to put the same meaning on the words " rates of wages " where they occur in cl. 23A. Clause 59, when one considers it, is a double-edged weapon. It seems to me that a converse argument might be based on it. It might be said that, as it was thought necessary in cl. 59 to make it clear by express words that payments for holiday wages were something not covered by " rates of wages actually . . . paid ", why was that not done in cl. 23A if it was intended that holiday payments or receipts should be excluded from " rates of wages " ? For that reason, which I need not elaborate, I feel that the clause which the learned judge relied on does not, as it were, bear the weight which he placed on it in construing cl. 23A; and that is why, in the first instance, I addressed myself to the construction of cl. 23A apart from this clause.

A further point was submitted on behalf of the employers. There was correspondence as to this very point. The first letter is a letter dated January, 1949, some two years before the contract in connexion with which the present controversy has arisen, from the clerk to the defendant council, the employers, addressed to the London Master Builders Association of which the contractor was a member. It is in these terms:

" Consideration has recently been given to the need for the retention of

> the up-and-down clause [that is the clause in question] in the council's building and civil engineering etc. contracts, and it has been decided to continue the arrangements for another year from January, 1949. Some modification has, however, been made in the scope of the clause. Hitherto the clause has covered increases in wage rates, national insurance, holiday pay, fares, guaranteed time, prices of all materials and transport. In future it will normally provide only for variations in wage rates and in the prices of a limited range of main materials, to be designated in each contract."

The contractor was informed of this letter, and was also informed that the association replied to that letter to the effect that it was not possible for the association to accept the proposal contained in the said letter; and the employers wrote back maintaining their decision. On Nov. 6, 1951, with reference to another contract then subsisting between the contractor and the employers, but before the entering into of this contract, the employers again wrote and said:

> "With reference to our recent conversation on increased costs, I have to confirm that cl. 23A (a) of the contract restricts the increase or decrease to the rates of wages payable only. Increases in the cost of holiday pay stamps are, therefore, not allowable."

It is submitted that if this court were of opinion (as I am of opinion) that, construing the clause, it covered these payments, this letter (or the effect of it) ought to be admitted in order to resolve an ambiguity if the words are thought to be capable of more than one meaning. Reliance was placed on the decisions in *Bank of New Zealand* v. *Simpson* (1) and *Charrington & Co., Ltd.* v. *Wooder* (2). Those were cases which decided that where the words used are susceptible of more than one meaning extrinsic evidence is admissible to show what were the facts which the negotiating parties had in their minds when they used the words the application of which is in controversy between the parties. I do not think that the employers can bring this letter within those words. The rule was stated by BLACKBURN, J., quoting himself from his work on CONTRACT OF SALE, p. 49, in *Grant* v. *Grant* (3):

> "The general rule seems to be, that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected."

These words fall within the latter part of that sentence. The letter is on the face of it saying: "This is what we say these words mean"; I think that the contractor was entitled to reply: "We do not agree with that; we accept your contract, and let the court decide whether you are right, or we are".

The employers could have altered the contract by putting in express words, but they did not choose to do so; and therefore I think it falls to this court to follow the ordinary rule, and to construe the contract as it was agreed between the parties.

For those reasons, I would allow the appeal.

MORRIS, L.J.: I agree fully with the judgment which my Lord has delivered; and although we are differing from the learned judge, I do not wish to add to what my Lord has said.

PEARCE, L.J.: I agree. *Appeal allowed.*

Solicitors: *Masons; Solicitor, London County Council.*

H.S.

(1) [1900] A.C. 182.
(2) [1914] A.C. 71.
(3) (1870), L.R. 5 C.P. 727.

Justice of the Peace Reports

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QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., STREATFEILD and DIPLOCK, JJ.)

October 22, November 21, 1958

DIRECTOR OF PUBLIC PROSECUTIONS *v.* NIESER

Criminal Law—Receiving stolen goods—Property obtained in circumstances amounting to felony or misdemeanour—Extent of knowledge which prosecution must prove—Proof of other stolen property having been in prisoner's possession—Proof of previous conviction for dishonesty—Larceny Act, 1916 (*6 and 7 Geo. 5, c. 50*), *s.* 33 (1), *s.* 43 (1).

Where a person is charged with receiving property obtained in circumstances which amount to felony or misdemeanour, it is sufficient to charge and prove that he knew that it fell into the general category of property obtained in circumstances amounting to felony or misdemeanour, as the case may be, and it is unnecessary to prove that he knew that it was obtained in circumstances amounting in law to the precise felony or misdemeanour by which it was in fact obtained. It is not, however, sufficient merely to prove knowledge that the property fell into the wider category of property dishonestly obtained.

PER CURIAM: Evidence adduced under s. 43 (1) of the Larceny Act, 1916, with a view to proof of guilty knowledge, that other stolen property has been found in the prisoner's possession or that he has been previously convicted of dishonesty is admissible only where the charge is that of receiving stolen property, and is not admissible where the charge is that of receiving property obtained in circumstances amounting to felony or misdemeanour.

CASE STATED by justices for the county of Middlesex.

On Apr. 24, 1958, two informations were laid by the appellant, the Director of Public Prosecutions, against the respondent, Brian Douglas Nieser, alleging that the respondent:

"(1) On a day unknown between June 12, 1956 and June 30, 1956, at Tottenham, received a 'Morphy Richards' refrigerator to the value of £54, knowing it to have been obtained under circumstances amounting to a misdemeanour, that is by false pretences, contrary to s. 33 of the Larceny Act, 1916.

"(2) On a day unknown between Aug. 18, 1956 and Aug. 31, 1956, received a 'Sobell' television set to the value of £71 10s., knowing it to have been obtained under circumstances amounting to a misdemeanour under s. 13 (1) of the Debtors Act, 1869, that is in incurring a debt or liability, obtaining credit under false pretences or by means of other fraud, contrary to s. 33 of the Larceny Act, 1916."

On May 2, 1958, the informations were tried summarily at Tottenham Magistrates' Court, the respondent pleading Not Guilty. The following evidence was given for the prosecution at the trial. Ethel Amy Honey stated, with regard to information (1), that she had pleaded Guilty before the justices to obtaining a Morphy Richards refrigerator by false pretences from Fleet Electrics, Ltd., in June, 1956, and that that was one of the offences for which she was now serving a sentence of nine months' imprisonment imposed on her at Middlesex Quarter Sessions, on Feb. 18, 1958. The refrigerator was obtained by her under a credit sale agreement, dated June 12, 1956, on which she had written, as the name of the purchaser, "Edward Smith"; the value of the refrigerator was £58 10s., and she paid a deposit of £4. She further stated that before obtaining the refrigerator, she went to see the respondent at his shop, told him that she was getting the refrigerator and asked if he would like to buy it; the respondent had said that he would like to buy it and she had then obtained it. The refrigerator was delivered

to her house where it was not installed but remained standing in the hall until the respondent came to collect it some six hours later, at night. She had accepted £25 from the respondent for the refrigerator. With regard to information (2), Mrs. Honey stated that she obtained a Sobell television set on credit sale terms under an agreement dated Aug. 18, 1956, which showed the credit sale price to be £90 6s.; she paid a deposit of £11 6s. and ordered the set, but the agreement was in the name of her son, Edward Honey, and was signed by him although she also signed it "E. Honey" as guarantor. When the set was delivered to her she sold it almost immediately to the respondent, without using it, and he collected it from her on the same night that it was delivered to her. She had accepted £35 from the respondent for the set. Detective Chief Inspector Eric Shepherd of the Metropolitan Police Company Fraud Department said that he saw the respondent at his premises on Sept. 11, 1957, when the respondent made a written signed statement that he was a second-hand dealer; that he knew the old lady living at 7, Westerfield Road (Mrs. Honey's address); that sometime at the end of 1956, the old lady asked him if he was interested in buying a television set and, having looked at the set at her house, he had agreed to buy it and had given her £40 for it; he then took home the set, which was the same set as that at present in his sitting room; he had not bought anything else from the old lady. Inspector Shepherd said that he called on the respondent again, on Sept. 13, 1957, when he saw a Morphy Richards refrigerator on the upstairs landing in the respondent's house; the refrigerator bore the same serial number as appeared in the credit sale agreement regarding a refrigerator referred to by Mrs. Honey. The respondent denied that he got the refrigerator from Mrs. Honey, and when asked if he gave or obtained a receipt for it, replied that he had not bothered to do so.

At the end of the prosecution's case, it was submitted that there was no case for the respondent to answer since no evidence had been given showing that the respondent knew, in either case, that an offence amounting to a misdemeanour had been committed. It was further submitted that the prosecution had to show, regarding the charge concerning the refrigerator, that the respondent knew that it had been obtained by false pretences in accordance with the particulars of the charge, and, regarding the charge concerning the television set, that he knew that it had been obtained by incurring a debt or liability, or by obtaining credit by false pretences or by means of some other fraud; the prosecution had not produced any evidence to show that this was the case. For the appellant it was contended that the prosecution were not required to prove that the respondent knew exactly what misdemeanour Mrs. Honey had committed; it was sufficient if there was evidence that the misdemeanours were committed and evidence from which it could be inferred that the respondent had guilty knowledge of the circumstances in which the goods were obtained, which was the position here. With regard to the form of the charge relating to the television set, where the misdemeanour alleged was under s. 13 (1) of the Debtors Act, 1869, the justices were referred to *R.* v. *Schweller* (1), by counsel for the respondent.

The justices were of opinion that Mrs. Honey had obtained the refrigerator and the television set in circumstances amounting to the alleged misdemeanours and that the respondent had bought them from her. The justices were further of the opinion that from the evidence as to the prices paid by the respondent, his statement that he did not bother about receipts, his signed statement that he had bought nothing other than the television set from Mrs. Honey and his other statements and conduct on Sept. 13, 1957, when seen by the police, there was

(1) (1924), 18 Cr. App. Rep. 52.

some evidence that he knew at the time when he received them that the goods had been obtained by some dishonest means. The justices were, however, of the opinion that there was no evidence that the respondent knew that it was by false pretences that Mrs. Honey had obtained the refrigerator, and that it was while getting credit by fraud that she obtained the television set. Accordingly, the justices found that there was no case to answer on either information, both of which they dismissed, and discharged the respondent.

The question stated for the opinion of the High Court was whether the justices were correct in holding that there was no case to answer on the informations.

Buzzard for the appellant, the Crown.
W. M. F. Hudson for the respondent.

Cur. adv. vult.

Nov. 21. **DIPLOCK, J.,** read the following judgment of the court: This court reserved judgment, because, in the course of argument, there emerged an important question of principle as to the essential ingredients of the offence or offences created by s. 33 (1) of the Larceny Act, 1916, which does not appear so far to have been judicially decided, and which is particularly important in an age when transactions by way of credit sale agreements are becoming increasingly common.

[His Lordship then read the informations and referred to the evidence called by the prosecution at the trial. He continued:]

At the end of the prosecution's case the respondent's counsel submitted that there was no case to answer. The submission was on two grounds, one of which applied to the second information only, and was abandoned in this court. It is sufficient to say that it was based on a misunderstanding of the decision in *R.* v. *Schweller* (1), which found some support in a passage in former editions of Archbold's Criminal Pleading and Practice which has been deleted in the most recent edition.

The second ground of submission applied to both informations and was based on the contention that to sustain a charge of receiving property knowing it to have been obtained in circumstances amounting to a misdemeanour which is specified in the charge it is necessary for the prosecution to prove that the accused knew that the property had been obtained by the misdemeanour so specified and not in some other albeit criminally dishonest way.

It was contended by counsel for the Crown that just as in a charge of receiving stolen goods knowing them to have been stolen it is unnecessary for the prosecution to prove that the accused knew of the details or even the particular form of the stealing, but that it is sufficient to prove that the accused knew that the property had been stolen generally, so, by analogy, in a charge of receiving property knowing that it has been obtained in circumstances amounting to a misdemeanour, it is unnecessary for the prosecution to prove more than that the accused knew of the circumstances amounting to a misdemeanour generally, without showing that he knew of the particular misdemeanour. He conceded that in a charge of receiving property knowing it to have been obtained in circumstances amounting to misdemeanour it would be insufficient, and indeed would be an effective defence, if it were shown that the accused believed, although erroneously, that the goods had been stolen; but he contended that under the doctrine of recent possession which, on the evidence, was applicable to this case, the justices were entitled to infer that the accused knew the true facts as to the

(1) (1924), 18 Cr. App. Rep. 52.

circumstances in which the goods were unlawfully obtained by Mrs. Honey, the person from whom the respondent obtained the goods.

The justices accepted the respondent's submission as correctly stating the law. [HIS LORDSHIP then read the opinion of the justices, who dismissed both informations and discharged the prisoner, and continued:]

The question of law put for the consideration of this court is whether the justices were correct in holding that there was no case to answer on either information. This involves two questions: (a) What knowledge of the circumstances in which property was criminally obtained by a third person must be shown to have been possessed by the accused in order that an offence of receiving property obtained in circumstances which amount to misdemeanour, contrary to s. 33 (1) of the Larceny Act, 1916, may be made out? (b) Was there any evidence in this case which would have entitled a jury to find that he in fact possessed that knowledge? The answer to the first question depends on the true construction of s. 33 (1) of the Larceny Act, 1916, which is in the following terms:

> "Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, shall be guilty of an offence of the like degree (whether felony or misdemeanour) and on conviction thereof liable—(a) in the case of felony, to penal servitude for any term not exceeding fourteen years; (b) in the case of misdemeanour, to penal servitude for any term not exceeding seven years."

This phraseology contains two ellipses. The nature of the first of these is apparent in comparing the language of the sub-section with that of sub-s. (4) of s. 33 which deals with very similar offences. Sub-section (1) speaks of "any property". It is only the presence of the word "knowing" followed by a statement of the facts known which connotes that these facts are true and thus by implication qualifies the generality of the expression "any property" by limiting it to "property which has been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour."

The first part of the sub-section expanded to fill this ellipsis would thus read: "Every person who receives any property (which has been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour) knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour shall be guilty of an offence . . ." Pausing at this point it is relevant to observe that the phrase "under circumstances which amount to felony or misdemeanour" must qualify the participle "stolen" as well as "obtained" for some stealing is neither felony nor misdemeanour but a summary offence only. Receiving goods stolen in circumstances which amount to a summary offence is excluded from the sub-section; it is dealt with separately by an unrepealed section, s. 97, of the Larceny Act, 1861. This construction of sub-s. (1) is reinforced by comparing its wording with the less elliptical wording of sub-s. (4) which refers to "property so stolen or obtained" and not to "property stolen or so obtained".

The second ellipsis is to be found in the words "guilty of an offence of the like degree (whether felony or misdemeanour)". The offence to which that committed by the receiver is to be "of the like degree (whether felony or misdemeanour)" is an offence other than that of which the receiver is himself guilty and must be the only other offence alluded to in the sub-section. It is tempting, having filled the first ellipsis, to say that this offence is the actual offence committed by the person by whom the property was in fact stolen or obtained irrespective of whether its degree was known to the receiver; but this, we think, would be

fallacious since the only express allusion to another offence contained in the sub-section is to the offence " known " by the receiver to have been committed.

Sub-section (1) expanded to fill the two ellipses thus reads: " Every person who receives any propert y(which has been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour) knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour shall be guilty of an offence of the like degree (whether felony or misdemeanour) (as the degree of offence known by such person to have been committed by the person by whom such property was stolen or obtained) and on conviction thereof liable (a) in the case of felony to imprisonment for any term not exceeding fourteen years (b) in the case of misdemeanour to imprisonment for any term not exceeding seven years."

The sub-section thus creates two classes of offence, one a felony, the other a misdemeanour, according to the circumstances in which the property received was stolen or obtained. It treats property as falling into two classes: (1) property which has been stolen or obtained in any way whatsoever in circumstances which amount to felony and (2) property which has been stolen or obtained in any way whatsoever in circumstances amounting to misdemeanour, and it requires as an ingredient of the offence knowledge by the receiver of at least the category into which the property that he has received falls.

Does it require more specific knowledge by the receiver than this of the nature of the offence committed by the person by whom the property was stolen or obtained ? Neither the structure of the sub-section itself nor its antecedent legal history compels us to such a conclusion.

At common law the offence of receiving was a misdemeanour and was limited to cases of property which was stolen. There is ample authority that in cases of stolen goods, which are by far the most frequent subject of receiving charges, it is unnecessary to prove detailed knowledge by the receiver of the circumstances of the original taking and this was so not only at common law but also under the Larceny Act, 1861, and is still so under the present sub-section. The Larceny Act, 1861, created by s. 91 the offence of felonious receiving, limiting it to cases of property which had been and was known by the receiver to have been obtained (whether by stealing or not) in circumstances which amounted to felony at common law or under that Act. By a separate section, s. 95, a new misdemeanour was created of receiving property which had been and was known by the receiver to have been obtained (whether by stealing or not) in circumstances which amounted to misdemeanour under the Act of 1861. Under the law as it stood between 1861 and 1916 there were thus two separate statutory offences chargeable under different sections of the Act of 1861 and a common law misdemeanour of receiving stolen property the stealing of which was not a felony either at common law or under the Act of 1861. It is, we think, plain from the wording of ss. 91 and 95 of the Act of 1861, first, that to constitute the offence of felonious receiving it was necessary to show that the receiver knew that the property received had been feloniously obtained, and that to constitute the statutory misdemeanour of receiving that the receiver knew that the property had been obtained in circumstances amounting to a misdemeanour, and secondly, that it was sufficient in either case to show that he knew that the property came within the general category of property with which the respective sections dealt; it was not necessary to show that he knew by what specific felony or by what specific misdemeanour the property had been obtained. We think that sub-s. (1) of s. 33 of the Larceny Act, 1916, did no more than to re-enact in a single section provisions corresponding to those of ss. 91 and 95 of the Larceny Act, 1861.

We are therefore of opinion that where property has been obtained in circumstances which amount to misdemeanour it is still sufficient under s. 33 (1) of the Larceny Act, 1916, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained in circumstances which do in law amount to misdemeanour and that it is unnecessary to prove that he knew that the property was obtained in circumstances which amount in law to the specific misdemeanour by which they were in fact obtained. On the other hand it is not sufficient merely to prove that the receiver knew that the property fell into the wider category of property which has been dishonestly obtained, for that is equally consistent with an erroneous belief that the property was obtained in circumstances which amount to felony and consequently falls short of establishing that degree of knowledge of the general category into which the property fell which we feel compelled to hold is an essential ingredient of the offence charged.

Similarly, where property has been stolen or obtained in circumstances which amount to felony it is sufficient, and it is also essential, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained in circumstances which do in law amount to felony, but it is unnecessary to prove that he knew that the property was obtained in circumstances which amount in law to the specific felony by which it was in fact obtained. But although this is sufficient to establish an offence of felonious receiving under s. 33 (1) of the Larceny Act, 1916, more specific knowledge is required where property has in fact been stolen and it is desired for the purpose of proving guilt to adduce evidence of guilty knowledge of the receiver of the kind referred to in s. 43 (1) of the Act of 1916. This evidence (that is of other stolen property having previously been found in his possession and of previous convictions for dishonesty) is admissible only in the cases where property has been stolen and the receiver knows that it has been stolen. To make such evidence admissible the receiver must be charged with knowing the property to have been stolen and not obtained in any other way even in circumstances which amount to felony.

It follows that in the present case the justices were right in holding as a matter of law that it was not sufficient to show that the accused knew that the goods were obtained by some dishonest means. The prosecution must go further and adduce evidence to show that he knew that they were obtained in circumstances which do in law amount to misdemeanour as opposed to felony. The justices were wrong, however, in supposing that it was necessary for the prosecution to adduce evidence to show that the accused knew the precise nature of the misdemeanour by which the property was in fact obtained.

This brings us to the second question whether in the present case there was any evidence to show that the accused in fact possessed the requisite degree of knowledge and in this connexion to the Crown's contention that the doctrine of recent possession entitled the justices to infer in the absence of any explanation by the accused that he had knowledge of the true facts in which the property was obtained by Mrs. Honey.

It may, we think, be misleading to speak of the " doctrine " of recent possession in cases of receiving. It is a convenient way of referring compendiously to the inferences of fact which in the absence of any satisfactory explanation by the accused may be drawn as a matter of common sense from other facts, including, in particular, the fact that the accused has in his possession property which it is proved had been unlawfully obtained shortly before he was found to be in possession of it. The so-called " doctrine of recent possession " is not limited to cases of receiving nor to inferences as to the accused's knowledge or state of mind.

The right inference from recent possession may be that the accused himself has stolen the property, as where he is found in the street near the scene of the house-breaking in possession of the property which has been taken from the house which has been entered. On the other hand, where property has been stolen and there is nothing in the circumstances to point to the accused's having himself committed the crime of stealing, the proper inference from its being found in his possession may be that he received the property knowing not merely that it had been unlawfully obtained but knowing that it had been stolen. Such an inference is justified by the fact that by far the commonest way in which property is unlawfully obtained is by stealing. But conversely, where property has been obtained in circumstances which amount to misdemeanour the inference cannot be drawn from its being found in his possession that he knew that it had been obtained in this much less common way as opposed to having been stolen. There may, however, in such a case be facts proved additional to the fact of recent possession which entitle the court to draw the inference that the accused knew the true facts as to the circumstances in which the property was unlawfully obtained, as where there is evidence of some association between the receiver and the person who obtained the goods, from which it might be inferred that the receiver was in the confidence of the other person and knew what he had in fact done.

The inference appropriate to the particular facts proved is not a presumption of law, it is merely an inference of fact drawn by applying common sense to the proved facts, and there is no "doctrine" that in a receiving case where recent possession on the part of the accused is proved he is presumed, in the absence of evidence to the contrary, to have known the true facts of the way in which the goods were obtained. In the present case there was no evidence of any association between the accused and Mrs. Honey before he bought the refrigerator or between that date and the date when he bought the television set. There was ample evidence that he knew that the goods had been obtained by dishonest means and had the goods in fact been stolen and not obtained in the circumstances amounting to a misdemeanour there would, for the reasons we have already indicated, have been a case to answer on the charge of receiving them knowing them to have been stolen. But the facts proved against the accused are precisely those facts from which in so many cases a receiver's knowledge that goods had been stolen is rightly inferred, and we see nothing in the evidence from which the justices could infer that the accused knew that the property had been obtained in circumstances amounting to a misdemeanour as opposed to having been stolen. There was thus no evidence of what we have regretfully held to be an essential ingredient of the offences with which the accused was charged, namely, knowledge by him that the property which he received fell within the category of property which had been obtained in circumstances which amount to misdemeanour. This appeal must therefore be dismissed.

We should have been glad to have been able to come to a different conclusion, for this case illustrates the difficulty with which the prosecution is faced on a charge of receiving where the goods have in fact been obtained by a misdemeanour such as false pretences. It seems the height of absurdity that the receiver should have committed no offence if he erroneously thought that the goods had been obtained by the graver crime of stealing; but, although it is the first time that the matter has come before the court, this appears to have been the law since the offence was first created in 1861, and if the matter is to be remedied, as we for our part think that it should, only Parliament can do so. *Appeal dismissed.*

Solicitors: *Director of Public Prosecutions; J. H. Fellowes.*

T.R.F.B.

COURT OF APPEAL

(LORD DENNING, HODSON and ORMEROD, L.JJ.)

November 28, 1958

Re D (an infant)

Adoption—Illegitimate child—Power to make order in favour of unmarried mother—Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *s.* 1 (3).

An adoption order may be made under the Adoption Act, 1950, s. 1 (3), authorising an unmarried mother to adopt her illegitimate child.

APPEAL against an order made by His Honour JUDGE CLOTHIER, at Lambeth County Court refusing to make an adoption order in favour of the applicant in respect of her illegitimate daughter, an infant. The grounds of appeal were, inter alia, that the judge misdirected himself in directing himself that s. 1 (3) of the Adoption Act, 1950, did not permit the adoption by an unmarried mother of her illegitimate child, or, alternatively, that such adoption should be limited to special cases, and that, on the inferences of fact and law, he was wrong in holding that the only reason for or advantage to be gained from the proposed adoption was the removal of the stigma of illegitimacy from the child.

Vick for the applicant.

H. E. Francis for the respondent, the London County Council.

LORD DENNING: In this case the mother of an illegitimate child seeks an adoption order. The judge has refused it. She appeals to this court. The mother is thirty-four years of age, the child, a girl, was born on Jan. 14, 1956, so the child is two years old, nearly three. The father was a married man living with his wife. The mother has had no communication with the father since the child was born, and she has not tried to make him responsible for the support of the child.

The mother, when the child was eighteen months old, obtained employment as resident housekeeper with a lady who lives in the south of London. The mother receives a wage of £2 10s. a week and full keep of her daughter and herself. The child and the mother each have a bedroom, and the child's room has been completely decorated and furnished by the employer. There is a good garden. Another lady lives in the house with the employer, and there is no doubt that these two ladies are very attached to the child and very interested in her welfare and education and they want the mother and the child to continue to live with them.

When the mother applied for an adoption order so that the child could be adopted by her, the case was inquired into, as the rules provide, by the welfare officer of London County Council, who, after stating the facts, reported that the care bestowed on the infant was satisfactory, and that the adoption order would appear to be in the infant's best interests. He recommended that a full order should be made. But when the case was inquired into by the county court judge, he refused to make the order. He pointed out that the welfare officer in his report had said that the mother was anxious to remove "the stigma of illegitimacy" from the child. He said:

> "No other reason for, or advantage to be gained from, the proposed adoption was advanced either by the applicant herself or by the welfare officer".

He refused to make the order because he said the Adoption Act, 1950, was not

> "designed or intended to be used simply for the purpose of 'removing the stigma of illegitimacy'. An adoption order if granted in this case, would no doubt soon become common form and illegitimacy would automatically be abolished in this country."

I find myself unable to agree with the reasoning of the judge. If one reads the words of s. 1 of the Adoption Act, 1950, it is plain to my mind that it contemplates an adoption order being made in the circumstances which are now before the court. Section 1 (3) provides:

> "An adoption order may be made authorising the adoption of an infant by the mother or father of the infant, either alone or jointly with her or his spouse."

Section 2 (1) says:

> "An adoption order shall not be made in respect of an infant unless the applicant [is over a certain age] or (c) is the mother or father of the infant."

Those sections seem to me to contemplate this very case. But the matter is carried much further by s. 12 (2) of the Act which provides that where an affiliation order is in force with respect to an infant and the infant

> "is adopted by his mother, and the mother is a single woman, the order [i.e., the affiliation order] shall not cease to have effect . . . upon the making of the adoption order . . ."

That shows that, if the mother of an illegitimate child gets an affiliation order against the father, and afterwards gets an adoption order herself, the order against the father still operates, so as to make him pay for the child.

The judge has asked what advantage is gained by making an adoption order. In property matters there are several potential advantages. An illegitimate child, according to the old common law, was a child of nobody: so that, if the mother died without making a will, or the grandmother or grandfather died without making a will, none of their property would ever go to the illegitimate child, because it was no relation in law to them. It was of no kin to anyone. If money was left to children by will, it never went to an illegitimate child, since the word "children" was always construed as referring only to legitimate children. That old law has been altered in part, but only in a very small part, by s. 9 of the Legitimacy Act, 1926. Now, if the mother of an illegitimate child dies without leaving a will, and has no legitimate children, then the illegitimate child can take as next of kin of the mother. That is the only alteration. In all other respects the old law remains. If the mother of an illegitimate child marries and has legitimate children, the illegitimate child is still excluded on an intestacy; whereas, if an adoption order is made, the illegitimate child ranks equally with the other legitimate children. Again, if the mother dies before the grandmother and the grandmother dies intestate, the illegitimate grandchild is excluded from any benefit in the grandmother's estate: whereas, if an adoption order is made, it will be entitled to a share. Again, if the mother, or anyone else, leaves a will leaving money to the "children" of this mother, the illegitimate child will take nothing: whereas, if an adoption order is made, the illegitimate child will rank as a child in the full sense of the law. So it does make a considerable difference if an adoption order is made.

The judge seems to think that by making an adoption order the child is rendered legitimate. That is not the case. Illegitimacy and adoption are entirely different matters. The child still remains illegitimate, but being adopted it becomes in law for all purposes a child of its mother and thereafter suffers none of the disabilities which attach to illegitimacy. Furthermore, as ORMEROD, L.J.,

pointed out, the child when adopted is registered in the adopted children's register, and that entry is received in evidence as if it were an entry in the register of births; so that, if an application has to be made for the child to go to a school, or any other place where the entry is necessary, then the entry in the adopted children's register can be used.

So it seems to me to be clear that there are advantages to the child if an adoption order is made. There must, of course, always be an inquiry whether the mother is a suitable person to be given an adoption order and whether the home is suitable. All the circumstances must be taken into account, but it is certainly no bar that the child is illegitimate.

I am glad to find that this court came to the same conclusion in 1957 in another case where the county court judge had taken the same view as this county court judge has taken here. The case was heard in camera so that it was not reported, and there is no record of the judgment, so far as we can find, anywhere. If it had been reported, no doubt we should not have had occasion to hear this case, because everybody would have known what the position is. We have been told that up till now eighty-seven adoption orders have been made in favour of mothers of illegitimate children. By our decision today we affirm that those orders have been rightly made within the jurisdiction of the county court judges concerned. I think that this appeal should be allowed and an adoption order should be made.

HODSON, L.J.: I agree. The main question which arises on this appeal came before this court, of which I was a member, on Feb. 6, 1957, where a learned county court judge had refused to make an adoption order on the application of an unmarried mother on the ground that he did not think the Adoption Act should be used to cover up the frailty of women placed in such circumstances. That really is the situation here; but it ought to be made plain that the Adoption Act, 1950, to the sections of which my Lord has referred, contemplates by the very terms of the Act itself in s. 1, s. 2 and s. 12, that an unmarried mother may well be the applicant for an adoption order. The exercise of the jurisdiction of the court is required in order to ascertain whether the mother or the applicant for the adoption order is able to look after the child and attend to the welfare of the child, the welfare of the child being the paramount object of the Act. In this case it is quite clear that the child will be well cared for in the home in which the mother is, where she is in the employment of a good employer who has done her best for the child and obviously has the welfare of the child at heart. Indeed, the welfare officer of London County Council, who has reported to the court, supported the application, as he was satisfied as to the prospects of the future welfare of this child. Therefore, there is no doubt that, in the exercise of the court's discretion, this order ought to be made.

It only remains to emphasise that an applicant for an adoption order in such circumstances is not handicapped by the fact that she herself is the unmarried mother of the child she seeks to adopt.

ORMEROD, L.J.: I agree.

Appeal allowed.

Solicitors: *William Sturges & Co.; Solicitor, London County Council.*

G.F.L.B.

COURT OF APPEAL

(LORD EVERSHED, M.R., LORD COHEN AND LORD SELLERS, L.J.)

November 24, 25, 26, 27, 28, 1958

TOWNSENDS (BUILDERS) LTD. *v.* CINEMA AND PROPERTY MANAGEMENT, LTD. (DAVID A. WILKIE AND PARTNERS, *Third Party*)

Public Health—Situation of water-closets—Breach of bye-laws—Recovery of price of works.

Work carried out by the plaintiffs, a firm of building contractors, involved on two floors of the defendants' dwelling-house the construction of a bathroom and lavatory in separate rooms. Entry was to be had to each of these rooms from two adjoining bedrooms. Bye-laws of the London County Council required that a water-closet should not be " entered from any room used for human habitation . . . provided that a water-closet used exclusively with a bedroom or dressing-room may be entered directly from such room ". Breach of the bye-laws was punishable by fine under s. 109 of the Public Health (London) Act, 1936. The building work in question infringed the bye-laws, but the plaintiffs did not know, until the work was advanced, that that would be the case. The local authority for a time did not insist on compliance with the provision of the bye-laws. In an action by the builders for work done the defendants contended that the price for the work in question could not be recovered because it was illegal by reason of being in breach of the bye-laws. The architect, who was brought in as a third party, submitted that the bye-laws were invalid as being unreasonable, unjust and uncertain.

HELD: (i) the bye-laws were not to be treated as invalid on the ground of unreasonableness, injustice, or obscurity in their language, and the court would be all the slower to hold bye-laws invalid in proceedings to which the local authority concerned were not parties; (ii) there was no fundamental illegality pervading the whole of the contract or the work done, and, therefore, the plaintiffs were entitled to recover.

APPEALS by the plaintiff company and the defendant company, with cross-notice by the third parties, from a decision of His Honour JUDGE SIR EDGAR DALE at Westminster County Court on May 12, 1958, in the action next mentioned. The plaintiff company, who were builders and are referred to hereinafter as " Townsend ", brought an action against the defendant company (hereinafter called " Harris "), which was owned and controlled by a Mr. Samuel Harris, to recover £150 for building work done in relation to two rooms at 92, Cheyne Walk, in the county of London, a house of which Harris was the owner. In this action Harris counterclaimed against Townsend for £493 for the cost of reinstating the two rooms to their original condition, since the product of the building work contravened bye-laws. By third-party notices served both by Harris and Townsend a firm of architects was brought in as third parties. As between Townsend and the third parties (of whom a Mr. Wilkie acted as architect in relation to the work at 92, Cheyne Walk, and who are hereinafter referred to as " Wilkie ") Townsend claimed to be indemnified against liability to Harris. As between Harris and Wilkie, Harris claimed damages for alleged negligence by Wilkie as Harris' architect, and Wilkie claimed £175 for unpaid fees. The case is reported only on the questions of the validity of certain building bye-laws of the London County Council and of illegality of the contract for building work, which in fact was not in accordance with the bye-laws, as a defence to a claim for payment for the building work.

The plan and specification of the work to be done at 92, Cheyne Walk was prepared by Wilkie. The work included fitting out a room on the first floor as a bathroom and lavatory with doors into two adjoining rooms. Mr. Harris was at that time seventy-eight years of age; his wife was an old lady and was in ill health. It was intended that the bathroom and lavatory should be available

for Mrs. Harris, who would be occupying, as a bedroom, one adjoining room, and also would be available to the nurse or companion or, in the absence of either, to Mr. Harris himself, who would be occupying the other adjoining room from which entry would be had to the bathroom and lavatory. On the second floor an existing bathroom and lavatory was to be made accessible from an adjoining room which was intended to be occupied by a man and his wife in the service of Mr. and Mrs. Harris. The result would be that the bathroom and lavatory on the second floor were accessible from two rooms occupied independently. The plans, at a subsequent stage, suggested that the two rooms on the first floor were intended to be occupied as a bedroom and dressing-room for Mrs. Harris and that two rooms adjoining the bathroom and lavatory on the second floor were intended to be used as a bedroom and dressing-room for Mr. Harris. These suggestions from the plans bore no relation to the facts as they were or had ever really been intended.

Townsend entered into a contract with Harris on Nov. 18, 1952, to do the building work. The contract recited that certain drawings and the specification had been signed and identified by the parties thereto and the terms of the contract were stated in conditions appended to the document. So far as is relevant the conditions were as follows:

" [Townsend] shall carry out and complete the work [i.e., the work specified on the attached specification] in accordance with the contract in every respect in accordance with the directions and to the reasonable satisfaction of the architect [i.e., Wilkie].

" 3 (a) [Townsend] shall comply with and give all notices required by any Act of Parliament or any regulation or bye-law of any local authority or of any public service company or authority who have jurisdiction with regard to the work or with whose systems the same are or will be connected . . . (b) [Townsend] before making any variation from the contract drawings or specification necessitated by such compliance shall give to the architect written notice specifying and giving the reason for such variation and applying for instructions in reference thereto."

Bye-laws made by the London County Council under s. 39 (1) of the Public Health (London) Act, 1891, and certain other statutory powers, with respect to water-closets provided:

" Water-closets

" 2. A builder constructing a water-closet in connexion with a building shall comply with the following requirements . . .

"(2) Entrance and entrance lobby. Such water-closet shall not be situated within nor entered from any room used for human habitation, or as a scullery, schoolroom . . . Provided always that a water-closet used exclusively with a bedroom or dressing-room may be entered directly from such room.

" Notice of work

" 9. Every builder who is about to execute any work as defined in these bye-laws shall serve on the sanitary authority of the district, at their office, at least twenty-four hours' notice in writing of the day and time at which such work is to be commenced, together with such detailed description as shall sufficiently describe the proposed work."

Work on the two rooms on the first and second floors of 92, Cheyne Walk, began in December, 1952, and was finished early in January, 1953. No notice was served as required by para. 9, before the work was begun. It came to the knowledge of Townsend, or some servant in his employ, before the work had

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been finished that, according to the local authority, the work on the two rooms involved non-compliance with para. 2 (2) of the bye-law. The work, however, was continued and finished; and in April, 1953, the local authority made it plain that in their view there was non-compliance with para. 2 (2) of the bye-law, and there was some threat of proceedings against Townsend.

As a result of negotiation the local authority refrained from insisting on compliance with the bye-law during the occupation of rooms on the first floor by Mrs. Harris, and Mr. Harris undertook that subsequently he would do everything possible to secure compliance with the bye-law. Mrs. Harris died in March, 1955. The infringement of the bye-law consisted in the fact that the bathroom, which included the water-closet as part of it, was accessible from two rooms and not only from one, being a bedroom or a dressing-room. Compliance with the bye-law could be secured if the bathroom were enclosed by a separate partition, because then the water-closet would not be directly accessible from the bedroom, but would be divided from it by what was described as an "intervening entrance lobby", viz., in fact, the bathroom.

At the trial of the action the county court judge decided that Townsend was entitled to recover the £150 claimed from Harris and rejected the defence put forward by Harris that the contract for this work was affected by illegality, viz., the infringement of the bye-law, so that payment was irrecoverable. The counterclaim by Harris was treated as having failed. The claim by Townsend against Wilkie did not arise. On the issue between Harris and Wilkie the county court judge found that Wilkie had been negligent and that Harris was entitled to damages. Both Townsend and Harris appealed and Wilkie gave a respondent's cross-notice. All issues in the action were thus before the Court of Appeal.

King-Hamilton, Q.C., and *Wiggins* for the appellant, Harris.
H. H. V. Forbes for the respondent, Townsend.
Gardam for the respondent third party.

LORD EVERSHED, M.R., after stating the facts and referring to the bye-laws, and after outlining the nature of the proceedings, and stating the conclusions of the county court judge and his order, continued: I will first deal with the argument that counsel for Wilkie put, with great force, that the bye-laws are void for unreasonableness, injustice and uncertainty, and can, therefore, be wholly disregarded. If that argument is right, there never was any breach of contract: nothing is wrong with the work done; and all this elaborate litigation has been based on a false premise. As was stated in one of the cases on which counsel for Wilkie particularly relied, this court will be always slow to hold that bye-laws are invalid. That case was *Kruse* v. *Johnson* (1). The short facts were that at a court of summary jurisdiction the respondent, a superintendent of police, preferred an information against the appellant for that he, on the day therein specified, did sing in a certain highway, within fifty yards of a dwelling-house there, after being required by a constable to desist, contrary to the bye-law. The question was whether the bye-law, which prevented not only Mr. Kruse but other vocalists from singing in the neighbourhood, was or was not invalid. The bye-law there the subject of attack was held not to be invalid. In the course of his judgment LORD RUSSELL OF KILLOWEN, C.J., said:

> "In this class of case it is right that the courts should jealously watch the exercise of these powers, and guard against their unnecessary or unreasonable exercise to the public disadvantage. But, when the court is called upon to consider the bye-laws of public representative bodies clothed with

(1) 62 J.P. 409; [1898] 2 Q.B. 91.

> the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered."

I respectfully adopt all that passage, and, adopting it, express my conclusion that, in the present case, it has not been established to my satisfaction that we should treat these bye-laws as invalid, on the ground of unreasonableness, injustice, or indeed obscurity in their language; and I would add that a court will be all the slower to hold bye-laws invalid in proceedings to which the local authority concerned are not parties.

Since, however, much argument has turned on these bye-laws, it would, I hope, not be entirely inappropriate if I said just this much about them, in case the matter should come to the attention of the local authority concerned. The bye-laws do, as framed, create some problems of difficulty. The bye-law of which I have read a part is one directed to builders, and it provides—" A builder constructing a water-closet . . . shall comply with the following requirements ". As will be seen presently, if he fails to do so he is liable to have proceedings brought against him and to be fined. The phrase " a builder constructing a water-closet . . . " assumes that work is in the course of being carried out by a builder. What he has got to comply with is then set out in para. 2 (2), which provides that " such water-closet shall not be situated within nor entered from any room used for human habitation ", and makes a proviso that a water-closet " used exclusively with a bedroom or dressing-room " may be entered directly from that room. If the present case is taken as an example, then at the time when Townsend was doing this work the water-closet which he was constructing was not being " used ". It is, moreover, equally clear that, though a builder may be told that the room into which access from the water-closet may be had will be used as a bedroom, it may be that the building owner will afterwards decide to use it as a nursery, scullery, schoolroom, or in any other way. I mention these matters because I cannot help thinking that on some future appropriate occasion the language might be made more clear, in order to show the builder what he was intended really to do or not to do. What I have said has a further specific reference because of the words of the proviso—" Provided always that a water-closet used exclusively with a bedroom or dressing-room may be entered directly from such room ". On that proviso, a wealth of argument was presented to the court below, and to this court, on the question whether the word " or " was, strictly speaking, disjunctive or not. It was said that, construing that proviso (as LORD RUSSELL OF KILLOWEN, C.J., said) " benevolently ", if a water-closet was accessible from two rooms, one being a bedroom and the other the dressing-room of the person using the bedroom as such, then that was something excepted by the proviso. As a matter of common sense there may appear to be quite a lot for the view that, if the bedroom and dressing-room are used by the same person, there would be no great harm in saying that he could get to his lavatory and bathroom from the dressing-room as well as from the bedroom. The learned county court judge indeed so construed this proviso; and it was for that reason that he was able to assess the damages on the footing that the bathroom and lavatory on the first floor did not, as constructed and supposedly used, involve non-compliance with this regulation. My own inclination is in the opposite direction: that is to say, giving such benevolence to the art of construction as I can, I am not satisfied that this proviso exempts from the

earlier prohibition a water-closet access to which may be had both from a bedroom and from a dressing-room, albeit that the dressing-room is the dressing-room of the occupant of the bedroom. The difficulty in the way of the other view seems to me to arise principally from the last five words, "entered directly from such room"—*singular*. In any case, however, I for my part agree with counsel for Harris that, when the matter comes finally for determination, the point is here academic; for, although the local authority were told by Wilkie, or someone in his service, that the two rooms [the rooms to the east and the south of and adjoining the bathroom and lavatory on the first floor], were respectively the bedroom and dressing-room of Mrs. Harris, that was not the fact. The intention was, and the fact was, that when the rooms came into use both rooms were used as bedrooms, so that, as regards the first floor, the situation was the same as it was on the second floor, namely, the work resulted in a bathroom-cum-lavatory directly accessible from two bedrooms occupied independently.

As I have referred to the plan, I will in passing note that that plan to which I have alluded was a plan bearing at the bottom right-hand corner the name of Wilkie's firm. It stated on the face of it what I have said, namely, that one room on the first floor was Mrs. Harris's bedroom and the other room Mrs. Harris's dressing-room. Equally it said, as regards the second floor plan, that one room was Mr. Harris's bedroom and the other room Mr. Harris's dressing-room. There is some question to what extent Mr. Wilkie personally saw the plan, or whether it was done by a Mr. Bransgrove, then his employee. It was sent to the local authority; and the representations contained in the drawings were quite plainly false. That fact was discovered because Mr. Harris so stated to the local authority shortly afterwards; and of course it is not to be wondered at that the local authority were not particularly persuaded to be helpful if they thought that they were (in the popular phrase) having dust thrown in their eyes.

It will be convenient for me to turn next to the argument founded on illegality. This is not a case where the contract can be said to be itself illegal, or to involve, on its face, the doing of something that was illegal, unless the specifications which are part of the contract showed, on the face of them, that what was going to be done, if it was done precisely as specified, would involve non-compliance with the bye-law. It was, on that ground, alleged by counsel for Harris (putting it picturesquely) that the work contracted for was work to make an "illegal" bathroom, and, that being so, it could not lie in the mouth of the contractor to claim payment for doing that illegal work. The learned county court judge rejected that argument; and so do I.

We were referred to the case, which was before this court in 1955, *Strongman (1945), Ltd.* v. *Sincock* (1); and we are all familiar with the many cases which arose when building work was found to have been done without a building licence under the Defence Regulations having been obtained. Although it was not always other than distasteful, it enabled a defendant who had had work done and who had enjoyed the benefit of it to say that he was not bound to pay for it because he and the builder had been party to what was in effect an illegal contract. To make that point clear, it is worth noting what was the regulation which was invoked in *Strongman (1945), Ltd.* v. *Sincock* (1). It was reg. 56A of the Defence (General) Regulations, 1939, which provided:

> "Subject to the provisions of this regulation the execution in the United Kingdom . . . of any operation specified . . . shall be unlawful . . ."

unless a licence had been obtained. That is a very clear, positive statement that the work without a licence is unlawful. The case with which we are concerned

(1) [1955] 3 All E.R. 90.

is of a somewhat milder complexion. The bye-law in question was expressed to be made under s. 39 (1) of the Public Health (London) Act, 1891, which states that "The county council shall make bye-laws with respect to water-closets", etc.; and, in sub-s. (3), that "It shall be the duty of every sanitary authority to observe and enforce the bye-laws . . ."

The bye-laws provide that "A builder constructing a water-closet . . . shall comply with" certain requirements. If he fails to do so (as counsel for Wilkie observed), he is liable to have invoked against him the powers under the Public Health (London) Act, 1936, and in particular s. 109, which provides that if it is apparent on an examination that any such work has been made or provided by any person otherwise than in accordance with bye-laws then that person is liable to a fine; and it would be a question whether the petty sessional court before whom the case came thought the case deserved a fine or not. There is, however, no fundamental illegality pervading the whole work and the whole contract. It is true to say, no doubt, that, if I have correctly construed para. 2 (2) of the bye-laws, then the bathroom and lavatory, as eventually it was made and left, having the access from two independent rooms, was not in compliance with the bye-law; and that, therefore, being contrary to the bye-law, an offence had been committed. But the first thing to observe as regards Townsend (and the same applies to Harris) is that, according to the county court judge's finding, though Townsend knew of the existence of the bye-law he did not know until the work was far advanced, at any rate, that what he had been called on by his contract to do and what the architect had invited him to do involved non-compliance with the bye-laws. That obviously would have a very substantial effect in any proceedings which might be brought against him. It is, secondly, made quite clear by the course of events in this case which began in January, 1953, and ended with the compromise agreement in June and July (to which I have already adverted) that the local authority felt it to be within their power (and no doubt rightly) to relax, or not strictly to enforce, the bye-law; for they made the compromise arrangement in which they said that they would not take any steps, but would leave matters as they were during Mrs. Harris's occupation. I note also (though to what extent it was in the forefront of anybody's mind I do not know) that they were prepared not only (so to speak) to put the telescope to their blind eye when looking at the first floor, but they observed the same complacency on the second floor also. Thirdly, it is to be observed that the work as done was not (like work done without a licence) illegal per se without more. It would only not comply with the bye-laws so long as something else was also done: the work could be made to comply simply by partitioning the water-closet within the bathroom. If the matter is tested by asking whether, on July 3, 1953, this bathroom was (in the phrase of counsel for Harris) "illegal", I think that the inevitable answer is that it was not. That being so, it seems to me that Townsend cannot be met, when he sues for the cost of the work that he has done, with this charge that he provided his client with an "illegal" bathroom, and therefore should not get paid for the work, which Mr. Harris and his wife proceeded thereafter to enjoy in exactly the same way as Harris had originally intended.

Without, therefore, saying more on that matter, I think that on the facts of this case the county court judge was well entitled to say that Townsend is not disabled from recovering the £150 on the ground of illegality. There was somewhat faintly presented (if counsel for Harris will allow me to say so) the suggestion that the work was quite worthless anyway; but I have perhaps said enough to show that the enjoyment by Mr. Harris for two years during his wife's life (and indeed ever since until he sold the house) seems to me to dispose of the notion that the work, which was done exactly as he had asked for it to be done, was

worthless. It therefore follows that, so far as the appeal of Harris against the judgment sought to set aside the judgment for £150, that appeal fails.

[HIS LORDSHIP then discussed the measure of damages on the counterclaim by Harris against Townsend. He determined the measure of damages to be the cost of complying with the bye-law by partitioning the water-closet from the bathroom, and held that Harris was entitled to damages against Townsend on that footing, notwithstanding that according to custom in building operations the architect was regarded as responsible for seeing that the work complied with bye-laws. HIS LORDSHIP held further that as between Harris and Wilkie, Harris was entitled to damages for negligence and Wilkie was entitled to recover unpaid professional fees. As between Townsend and Wilkie HIS LORDSHIP held that Townsend was entitled to be indemnified by Wilkie against liability to Harris.]

LORD COHEN: I agree so entirely with what has been said by LORD EVERSHED, M.R., that I only desire to add one or two observations on the question of illegality. As the Master of the Rolls pointed out, it is quite plain from the terms of the contract that there is nothing inherently illegal in it. Indeed, it might be said that condition 3 was so framed as to prevent the possibility of any such illegality. The illegality relied on by counsel for Harris was solely in the performance, and it might well be that that would have been enough if there had been no subsequent waiver by the local authority of the strict enforcement of the relevant bye-law and if the arrangement that has been mentioned had not been made. But, that having been made, it seems to me that the position is radically altered. Mr. Harris no doubt could have refused, before that arrangement was reached, to honour the final certificate, either on the ground of illegality or on the ground that, having regard to condition 3, the work done was not within the contract. It seems to me that when he has obtained that modification from the local authority and then continued to enjoy the benefit of the work done by Townsend at least for the period of his wife's lifetime and indeed, so far as we know, down to the date on which he sold the property, we are in no way deviating from the principles laid down in the cases cited (to which LORD EVERSHED, M.R., has referred) if we say that in those circumstances Mr. Harris cannot both have his cake and eat it and that the defence of illegality fails.

I do not think that I can usefully add anything on the other points. For the reasons which my Lord has suggested I concur in the order which he proposes.

SELLERS, L.J.: I agree so fully with the judgment of LORD EVERSHED, M.R., and the further observations of the noble Lord that I do not seek to add any words of my own to the judgment with regard to these matters. I am prompted, however, to refer to some observations of CHANNELL, J., and indeed to adopt them, having regard to the general observations that LORD EVERSHED, M.R., has made with regard to the bye-law. In *Salt* v. *Scott Hall* (1), CHANNELL, J., said:

> "It seems to me that all bye-laws relating to the construction of buildings ought to have something in the nature of a dispensing power, enabling the local authority or its surveyor or other officer to say that a particular building is of an exceptional character, and that the hard and fast rules laid down by the bye-laws as to the mode of construction ought not to apply to it. But I think it would be most mischievous to hold that the absence of such a dispensing power necessarily made the bye-law bad."

The only justification for what happened in this case was that there were, perhaps, special circumstances relating to this particular property.

Order of the county court judge varied.

Solicitors: *Dod, Longstaffe & Fenwick; W. J. Fraser & Son; Sydney Redfern & Co.*

F.G.

(1) 67 J.P. 306; [1903] 2 K.B. 245.

COURT OF APPEAL

(LORD EVERSHED, M.R., SELLERS AND PEARCE, L.JJ.)

October 20, 21, 22, November 4, 1958

AUTEN *v.* RAYNER AND OTHERS

Police Records—Production as evidence—Objection by Home Secretary—Finality.

The plaintiff claimed from the defendants damages for conspiracy to defraud, false imprisonment, and malicious prosecution. The third defendant was a detective constable in the Metropolitan Police Force, and in his affidavit of documents he claimed privilege for reports made by him to his superior officers and communications passing between the Metropolitan Police Force and other police forces on the ground that their production would not be in the public interest. The Home Secretary objected to the production of those documents on the same ground. The plaintiff asked for an order that those documents should be produced, inter alia, on the ground that fraud against a member of the police force had been alleged.

HELD: (i) the principle that in an action the right to privilege might be lost where fraud was alleged was not applicable to the right of the Crown to withhold documents from discovery; (ii) a decision of a responsible Minister of the Crown as to the non-disclosure of documents which was unimpeachable on its face was final.

INTERLOCUTORY APPEAL by the plaintiff from an order of ASHWORTH, J., dismissing the plaintiff's appeal from the refusal of Master HARWOOD to order the third defendant, Patrick Bolongaro, to produce documents as regards which the Home Secretary had certified that their production would not be in the public interest.

Pritt, Q.C., and *Platts-Mills* for the plaintiff.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*) and *Rodger Winn* for the Home Secretary.

H. K. Woolf for the first and second defendants.

Veale, Q.C., and *Stabb* for the third defendant.

Cur. adv. vult.

Nov. 4. **LORD EVERSHED, M.R.,** read the following judgment of the court: The question in this appeal is whether the appellant, the plaintiff in two consolidated actions, can successfully challenge the decision of the Secretary of State for Home Affairs to withhold from production certain documents specified in the second part of an affidavit sworn on Jan. 16, 1958, in the first of the two actions by the third defendant therein, one Patrick Bolongaro. The documents in question are reports made by the defendant as a detective constable in the Criminal Investigation Department to superior officers and communications passing between the Metropolitan Police Force and other police forces. By their inclusion in this part of the defendant's affidavit, the documents must be taken to be in the defendant's possession or power and to be relevant to some subject-matter in the action. But, as appears from their brief description, the documents appear at first sight clearly to be of the class that may be described as official police records; and as such the Secretary of State has determined that they should be withheld from production.

The question is one of the kind of which from time to time examples have come before the courts in recent years and in which there is an apparent conflict between what is called "the public interest", on the one hand, and, on the other, the interests of the due administration of justice and of the parties to particular litigation. As such, the case has, as have other like cases, called for anxious consideration; since although the right and duty of the Crown in certain cases to withhold documents from production is undoubted, the court is bound to look with somewhat jealous care on any exercise of executive powers which have

the effect of overriding or ousting the jurisdiction of the courts in matters which are prima facie peculiarly within their province. These anxieties were forcefully expressed by LORD RADCLIFFE, with the concurrence of LORD SOMERVELL, in the recent case of *Glasgow Corpn.* v. *Central Land Board* (1). Where the "public interest" is that concerned, e.g., with the protection of State secrets, as commonly understood, or with matters related to international diplomacy, the primacy of the "public interest" is readily accepted; but the problem is, at first sight at any rate, less easy when the "public interest" is that of the proper functioning of some aspect or department of the public service. In such cases, indeed, the expression "public interest" is perhaps not an altogether happy formula, since it seems on the face of it to overlook the obvious fact that the requirements of the due administration of justice are themselves in the highest degree in the public interest. Nevertheless, it is undoubtedly also of the first importance to the good order and government of the nation that those concerned in all departments of the public administration should not be embarrassed or restricted in the loyal and conscientious discharge of their duties by fear that what they may confidentially record in the course of those duties should thereafter be made public. These are the considerations which may justify in such cases as the present the right of the Crown to withhold documents from production. The case being, then, one calling for anxious consideration, as well as of some public interest, we are much indebted for their arguments to the learned counsel for the plaintiff and for the defendants, as also to the Attorney-General and Mr. Winn, who have assisted the court on behalf of the Crown.

In the consolidated actions the plaintiff has made very serious charges against the respective defendants thereto. In the first action (with which we are particularly concerned and in which the third defendant, Bolongaro, is joined) the charges are, briefly, of conspiracy to injure and defraud, of false imprisonment, and of malicious prosecution. Those charges are of the gravest character, and it is obvious that, if they are to be made good, they will have to be clearly and strictly proved. Counsel, in opening the case for the plaintiff, quite properly indicated the nature of the case he was making; for it was one of his main arguments that if he showed a prima facie case of the fraud he alleged, then the principle which might otherwise justify the Crown's claim to withhold documents from production without challenge was inapplicable. Counsel for the defendant Bolongaro strongly contended that, at least as against his client, no such prima facie case had been shown. The Attorney-General, on behalf of the Crown, without, of course, conceding (as not being a party to the action he could not in any case do) that a prima facie case of fraud had been established on the plaintiff's part, was content to argue the question of the validity and conclusiveness of the Secretary of State's decision on the hypothesis that it had. In the circumstances, it is unnecessary for us to express any view whether on the material so far available there is a prima facie case of fraud against the defendant Bolongaro; and we express no view accordingly. For we are in no sense trying the action. But having regard to the publicity which, naturally enough, a case like the present is apt to attract, we think it right to make it plain that by a prima facie case is meant no more than a case which calls for an answer. We repeat that we express no view whether such a case has been made out. Certainly the defendants, including the defendant Bolongaro, have not so far had the opportunity of answering any such case. We think it also right to make clear that, as counsel for the plaintiff very readily conceded, the effect of the non-disclosure of the documents in question may, if sustained, be by no means to the exclusive disadvantage of the plaintiff.

(1) 1956 S.C. (H.L.) 1.

With this introduction it will be both logical and convenient for us to deal first with the plaintiff's claim to disqualify the affidavits sworn by the Secretary of State on the ground that the latter's connexion with or interest in the first two defendants, Colonel and Mrs. Rayner, and the businesses with which they are connected, infects the Secretary of State with such liability to bias as would reasonably be regarded as disabling him from personally arriving at a fair judgment on the question of disclosure of the documents; for if this point is made good, then it would, according to the argument, follow that the affidavits so far sworn by the Secretary of State could not be regarded in any case as conclusive of the matter. It should be said at once that counsel for the plaintiff has not suggested that the Secretary of State, Mr. Butler, was in fact so biased: but it was said, nevertheless, that a man in the situation of the plaintiff (having been the defendant in an action brought against him by the defendants Rayner, which had been abandoned after nearly two years, and having been charged in criminal proceedings arising out of the same subject-matter, which proceedings had been stopped at the trial by the judge) would reasonably regard the Secretary of State as being so biased. We agree entirely with the learned judge that these suggestions of bias should be wholly rejected.

The justification for the suggestion of bias arises from the circumstances that the late wife of the Secretary of State was a member of the well-known Courtauld family (having been a daughter of the late Samuel Courtauld); that he holds a number of shares in Courtaulds, Ltd., and that he was a director of that company before becoming a Minister of the Crown. The defendant Colonel Rayner's brother is also married to a member of the Courtauld family, viz., the daughter of Samuel Augustine Courtauld, first cousin to the late Mrs. Butler's father; and the defendant Rayner is also a director of and shareholder in certain companies (connected with the film industry) in which other members of the Courtauld family (namely, Mr. J. S. Courtauld and Mr. S. L. Courtauld) were during the lives co-directors with him, their shareholdings being now vested in their estates. We thought it right in the circumstances to look at two affidavits sworn since the hearing before ASHWORTH, J., one by the plaintiff himself and one by a Mr. Coulson, a chartered accountant. To the former is exhibited a "pedigree" of the Courtauld family and other exhibits showing (inter alia) the devolution of the estates of members of the family. These exhibits show that the members of the family were and are persons of substance who may be said to be closely linked together as a family. To Mr. Coulson's affidavit one of the exhibits consists of what he has called a

> "schedule of brief particulars of companies in which the defendants [Colonel and Mrs. Rayner] and/or associates of theirs . . . have been concerned as directors, secretaries or in other ways."

We have examined this material, but we do not refer in greater detail to it. For, as counsel for the plaintiff fairly conceded, it does not amount to very much. In our view, the learned judge was well justified in describing the link between the Secretary of State and the defendants Rayner, by marriage and otherwise, as "extremely slender". We have already observed that no bias in fact is alleged. Indeed, if the matter is viewed dispassionately, it is, in our judgment, extravagant to suppose that one holding the responsible position which Mr. Butler holds, having his long experience of public affairs, and having also available to him the skilled advice which his Department can provide, would, in such a matter as this, relating to reports by junior to senior police officers and communications between police forces, be in the least disabled or disqualified by reason of the private interests to which we have alluded.

It was contended, however, that the Secretary of State was exercising a duty and a function which was in some degree judicial, since it involved a weighing up of the interests of the public service, on the one hand, and, on the other, those of the due administration of justice and of individual litigants in a lawsuit; and this being so, that the test of reasonableness must be that fairly attributable to one in the situation of the plaintiff in that litigation: in other words, that the question is whether the plaintiff, in the light of the experience which he alleges, would reasonably suspect the Secretary of State of bias. For this proposition counsel for the plaintiff referred to the case in the Probate, Divorce and Admiralty Division of *Cottle* v. *Cottle* (1). In that case a husband who was a party to matrimonial proceedings before magistrates questioned the propriety of the chairman of the Bench adjudicating in the matter. The objection was based on the admitted fact that the chairman was a close friend of the wife's mother and also, on evidence given by the husband, that his wife had told him she would bring the dispute before the chairman who would " put him (the husband) through it ". In the circumstances it is not surprising that the conclusion of the Divisional Court was to the effect that the husband might reasonably lack confidence in the chairman's impartiality, and that in the interest of the due administration of justice, including the principle that justice should appear manifestly to be done, the chairman should be regarded as disabled from adjudicating in the case. We refer again later to the question whether in a case such as this the Secretary of State should be regarded as in any sense exercising a judicial, as distinct from a purely executive, function. But assuming that he is in any sense " adjudicating ", it is plain that the circumstances of the present case are, for present purposes, very widely different from those in *Cottle* v. *Cottle* (1). As we have said, the link between the interests of the Secretary of State and those of the defendants Rayner is extremely slender. Moreover, in reaching his determination he is not adjudicating on the issues between the plaintiff and the defendants Rayner, and he is not alleged to have any community of interest at all with the defendant Bolongaro. His function (so far as the question of alleged bias is relevant) is to decide between the interests of a Department of the public service and those of the parties (defendants as well as plaintiff) to certain litigation.

If there is justification for the charges made in the action by the plaintiff, he no doubt feels and is entitled to feel strongly about the events narrated in his statement of claim. But, allowing for all this and assuming that the test of reasonableness is to be applied in reference to one in the plaintiff's position, and assuming also, as we have done, that the Secretary of State should be regarded as having in some degree acted judicially, still we are quite unable to accept the plaintiff's contention that the Secretary of State's determination must be treated as disqualified from finality on the ground of liability to bias. In his second affidavit of Apr. 18, 1958, Mr. Butler has sworn that at the time when he swore his former affidavit the circumstances above mentioned alleged to justify the suggestions of bias were not present to his mind, and that, having had his attention since drawn to them, he none the less remains of opinion that in the public interest the documents should be withheld from production. In our judgment, making the allowances and assumptions above mentioned in his favour, the plaintiff ought reasonably and without reserve to accept it that the Secretary of State's determination is without taint of bias.

The question of bias being out of the way, it must follow that the objection to the Secretary of State having personally determined the question of disclosure

(1) [1939] 2 All E.R. 535.

is also disposed of. It was the contention of the Attorney-General, founding himself on the language of VISCOUNT SIMON, L.C., in *Duncan* v. *Cammell Laird & Co., Ltd.* (1) and his citation of the judgment of WILLS, J., in *Hennessy* v. *Wright* (2), that in all these cases the decision and the responsibility for it must be taken by the Ministerial head of the Department, save in the exceptional circumstances mentioned by LORD SIMON, which have no present application. We think that this is the correct view: and in any case, as counsel for the plaintiff observed, the Secretary of State has in the present case himself in fact assumed the responsibility. The only question then remaining is whether the decision of Mr. Butler, expressed in his two relevant affidavits, must be taken as conclusive: for counsel has not before us proceeded with either of the two grounds suggested before ASHWORTH, J., for showing that the *Cammell Laird* case (1) is no longer binding authority.

It was again a contention of the Attorney-General, founded on LORD SIMON'S speech and particularly on the language of a passage in that speech, that the decision is conclusive; that the function of the Minister is merely executive and in no sense judicial, and, therefore, not liable or capable of review in the courts; and, indeed, that the Minister was not at all concerned with the details or nature of the litigation in which the question of disclosure has arisen. If the certificate of the Minister is on the face of it, that is, in form, valid, that (according to the submission of the Attorney-General) is the end of the matter.

On the other side, counsel for the plaintiff contended, first, that where the action charged fraud and, particularly, where a public servant was alleged to be party to the fraud, and where a prima facie case for such fraud had been made out, then the principles which would or might ordinarily render sacrosanct a Ministerial decision were displaced, with the result (as we assume) that it would then be competent for the court to determine whether in truth the "public interest", that is, the interest of the Department concerned as a Department of State or its equivalent, outweighed the requirements of the due administration of justice. In support of this contention counsel for the plaintiff argued that if it were prima facie shown that the documents concerned had been contrived in pursuance or furtherance of the fraud, then it followed that there was no room for, or relevance in, the argument that the public interest required that the completeness and candour (and particularly the latter) of official reports and the like should be treated as confidential.

Secondly, and more broadly, counsel for the plaintiff disputed the proposition that the Minister was in no sense acting judicially in his determination. He particularly relied on the observations of JENKINS, L.J., in *Ellis* v. *Home Office* (3), where he said:

> "But I would urge that in the interests of justice—particularly in a case like the present, which concerns a claim of one of Her Majesty's subjects against a government Department—documents within the ambit of privilege should be most carefully scrutinised, and the person entrusted with that task should, in regard to each document, ask himself whether it is relevant to the plaintiff's case, whether the plaintiff's case will be hampered or impeded if it is not made available, and, if so, whether the probability of any harm being done to the public interest by disclosing it is sufficient to outweigh those other considerations."

It was argued that if effect were to be given to those requirements it followed that

(1) [1942] 1 All E.R. 587; [1942] A.C. 624.
(2) (1888) 53 J.P. 52; 21 Q.B.D. 509.
(3) [1953] 2 All E.R. 149; [1953] 2 Q.B. 135.

the Minister must acquaint himself with the relevant facts of the case in suit and must weigh, and form a judgment on, the relative claims of the Departmental interest, on the one hand, and the administration of justice on the other.

We do not propose to attempt any exposition of the principles laid down in the cases, and particularly in the *Cammell Laird* case (1), which would or might be applicable to other than the circumstances of the present appeal—except to express the opinion which we have clearly formed that *O'Rourke* v. *Darbishire* (2) cannot be regarded as authority for the view that the Crown's ordinary right of withholding disclosure of documents is altogether displaced wherever fraud is alleged or prima facie proved. *O'Rourke* v. *Darbishire* (2) dealt with the right to privilege from discovery which the private individual in certain circumstances has. In our judgment, its principles are not applicable to the right of the Crown to withhold documents from discovery, a right somewhat misleadingly called "Crown privilege". Where in an action between private individuals fraud is alleged, the parties concerned lose the benefit of their private right to privilege. But here there is no right which a private person can forfeit. It is a public right required and justified by the administration of public affairs.

Notwithstanding the argument of the Attorney-General, we were informed by Mr. Winn that in the present case the Secretary of State had in fact informed himself of the nature of the present action and of the allegations made therein, and had also borne in mind the effect on the presentation of the cases both of the plaintiff and of the defendant Bolongaro of the withholding of the documents in question, including the consequence that the latter would not be able to give secondary evidence of their contents; and that, having considered those matters, the Secretary of State had reached his decision for non-disclosure. The form of language of Mr. Butler's two relevant affidavits reflects what Mr. Winn said; for the Secretary of State speaks of having formed "an impartial judgment" and he states clearly the conclusion that in his view in the public interest, and for the purpose of the proper functioning of the public service, the documents in question should be withheld from production.

In those circumstances we are of opinion that the form of the Secretary of State's "certificate", being on the face of it unimpeachable, and the conditions to which LORD SIMON referred in the *Cammell Laird* case (1) at least not being shown not to have been satisfied, the court is bound to treat the certificate as conclusive. Even if the language of JENKINS, L.J., in *Ellis* v. *Home Office* (3) be regarded as indicating a Minister's duty in reaching his conclusion (on which we express no view), then again it is, in our judgment, not shown that such duty was not in this case performed; and the result is the same. For we observe that the language of the lord justice which we have quoted followed immediately his statement that it was right that the decision of the responsible Minister on the question of disclosure or non-disclosure should be final. If the two passages are read together the result lends support to the view that the observations on which counsel for the plaintiff relied were merely by way of advice or admonition; that the Minister is in no way concerned as such with the issues between the parties or the relative importance in an action of the material sought to be disclosed. The Minister should no doubt accept and recognise that the proper administration of justice may be impeded or may be unattainable if any document or any evidence which the court would allow to be seen by the parties or which the court would allow to be put or given in evidence is withheld. Nevertheless his

(1) [1942] 1 All E.R. 587; [1942] A.C. 624.
(2) [1920] A.C. 581.
(3) [1953] 2 All E.R. 149; [1953] 2 Q.B. 135.

sole concern is whether the interests of the State in the sphere for which he is the responsible official would be so affected that the Crown should withhold documents or evidence from the parties and the court.

In our judgment, therefore, the result in the present case is not affected by the consideration that fraud is alleged or, as has been assumed for the purposes of the present argument, prima facie established. Nor is the result affected if it was the duty of the Minister to weigh in the balance the considerations to which LORD SIMON referred in the *Cammell Laird* case (1), or to which JENKINS L.J., alluded in *Ellis* v. *Home Office* (2). That, as we think, is sufficient to dispose of the present appeal. As we have said, it is not necessary, nor do we think it useful, for us to express further views which would only be applicable in circumstances other than those of the present case. In particular, we express now no view on the question (which in our judgment does not arise on this appeal) what the result might be in a case where the Secretary of State's certificate or conclusion were on the face of it expressly based on the premise that the document or documents which he had determined to withhold was or were of a particular character or class and it were then shown aliunde that in fact he had been mistaken in the premise.

Appeal dismissed.

Solicitors: *W. H. Thompson; Treasury Solicitor; Herbert Baron & Co.; Solicitor, Metropolitan Police.*

F.G.

(1) [1942] 1 All E.R. 587; [1942] A.C. 624.
(2) [1953] 2 All E.R. 149; [1953] 2 Q.B. 135.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., HILBERY, CASSELS, BARRY and PAULL, JJ.)

December 1, 1958

R. *v.* EVANS

Criminal Law—Sentence—Two offences—Probation order in respect of one—Detention in detention centre in respect of the other—Invalidity of probation order.

The appellant pleaded Guilty at quarter sessions to an offence of storebreaking and larceny and also to an offence of storebreaking with intent to steal. In respect of the first offence he was sentenced to three months' detention in a detention centre, and in respect of the second he was placed on probation for two years. Subsequently, he was convicted at a magistrates' court of larceny and was fined. Later, he was brought back to quarter sessions to receive sentence for the offence for which he had been placed on probation and was sentenced to Borstal training.

HELD: that, though the express language of the Criminal Justice Act, 1948, did not forbid such a course being adopted where there were two separate offences charged in separate counts, the making of a probation order in such circumstances was contrary to the spirit and intention of the Act, and the court must, therefore, quash the probation order and substitute for it an order for detention in a detention centre for three months, to run concurrently with the order on the first count. In the result, as the sentence of Borstal training had been imposed in respect of a breach of the probation order and as the probation order had been quashed, the Borstal sentence must also be quashed.

APPEAL against sentence.

In April, 1957, the appellant, Raymond Frederick Evans, now aged 18, appeared before Surrey Quarter Sessions on two charges, one of storebreaking and larceny and one of storebreaking with intent to commit a felony. He

pleaded Guilty and was sentenced to three months in a detention centre on the first count and placed on probation for two years on the second count. On July 19, 1958, at Wimbledon Magistrates' Court he pleaded Guilty to stealing 8s. from a gas meter and 12s. from his employers and was fined £4 for each offence. He was brought back to Surrey Quarter Sessions in respect of the breach of the probation order made in April, 1957, and, on July 28, 1958, he was sentenced to a term of Borstal training for the offence for which he had been placed on probation. On Nov. 24, 1958, he appealed against this sentence. It was contended on his behalf that a probation order should not have been made in April, 1957, to run concurrently with a sentence of detention, and that as the original probation order was invalid there was no breach which would enable a sentence of Borstal training to be imposed. The hearing of the appeal was adjourned for a week in order that a court of five judges might decide whether the probation order was valid.

P. A. Bruce for the appellant.
H. J. Leonard for the Crown.

LORD PARKER, C.J., delivered this judgment of the court. This appellant, aged eighteen, pleaded Guilty in April, 1957, at the Surrey Quarter Sessions to two offences, one of storebreaking and larceny and the other of storebreaking with intent to commit a felony. Both offences were committed with another boy on the same night, and the appellant was sentenced to three months in a detention centre on the first count and placed on probation for two years on the second count. In July, 1958, he pleaded Guilty to larceny from a gas meter and also to larceny as a servant, and he was fined before a magistrates' court at Wimbledon. On July 28, 1958, he was again brought before Surrey Quarter Sessions on breach of the probation order, when he was sentenced to Borstal training. The appellant then applied for leave to appeal to this court against that sentence of Borstal training, and the court, being concerned whether the original probation order running concurrently with the sentence of detention was a proper order, extended the time and gave leave to appeal against the original order made in April last.

The relevant sections of the Criminal Justice Act, 1948, are s. 3 and s. 18. So far as they are material they provide as follows. Section 3 (1) provides:

> "Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order . . ."

Section 18 (2), which is the section providing for detention in a detention centre, is as follows:

> "A court shall not order a person to be detained in a detention centre—(a) if he has been previously sentenced to imprisonment or borstal training; (b) if he is not less than seventeen years of age, and has previously been ordered to be so detained since attaining that age; and shall not order any other person to be so detained unless the court has considered every other method (except imprisonment) by which the court might deal with him and is of opinion that none of those methods is appropriate."

It is quite clear that if there had only been one offence it would have been impossible to couple an order for probation with a sentence of three months' detention in a detention centre. By s. 3 (1), which I have read, a probation order could only be made instead of a sentence and by s. 80 of the Act it is

provided that " sentence " includes an order for detention in a detention centre. In the present case, however, there were two counts equivalent to two separate indictments, and if one looks at the express words of the Act, there does not appear to be anything which expressly prevents a probation order being made on the second count instead of a sentence on that second count. It may be rather artificial that when the court have both offences before them and have to consider the circumstances, it should be proper for them to treat these two offences as completely separate; and thus that the court should apply their minds, with regard to the first count, to s. 3 and s. 18 and, having dealt with those enactments in relation to the first count, should proceed to apply their minds quite independently in regard to the second count. Be that as it may, it appears to this court that there are no express words which prevent these two orders being made at one and the same time. Though that may well be so, however, the court is clearly of opinion that the making of a probation order in such circumstances is contrary to the spirit and intention of the Act. To take the present case, the proper sentence, as it seems to us, should have been three months in a detention centre on each count to run concurrently. For the court of quarter sessions to substitute probation in regard to the second count is really in the nature of providing for after-care. We are far from saying that some provision for after-care in such a case would not be very highly appropriate. A young man coming out of a detention centre after a period of discipline may need looking after, and it may well be to his advantage to be under the supervision of a probation officer; but the question is whether s. 3 and the provision for probation can properly be made use of to provide for after-care. The matter becomes really clearer if one considers the position in reverse. Supposing in this case on the first count the court had made a probation order and then gone on in the second count, considering the matter quite independently, to make an order for detention for three months in a detention centre. If one looks at it in that way it becomes quite clear that the only justification for the probation order on the first count would be to provide for after-care. It is also clear that if such an order as was made in this case is properly made it could also be made in the case of imprisonment. For two offences being dealt with at one and the same time, if the argument is right, there could be a short sentence of imprisonment and at the same time a probation order for three months. That clearly could be only for the purposes of after-care, and provision is made in the Criminal Justice Act, 1948, s. 22 (1), for after-care.

Again, there is the further point that in the ordinary way a probation order must operate forthwith, whereas in the present case it could not become effective until the appellant was released from a detention centre. No doubt it does happen at times that a probation order and a sentence of imprisonment or indeed detention in a detention centre might run concurrently. Thus, a sentence of imprisonment imposed during the currency of the probation order would not revoke that order. The order would merely fall into abeyance, and if the prisoner were released before the expiry of the probation period the probation order would revive and be fully effective. But that is quite a different case from the present when the coming into operation of the order itself is in effect postponed. After all, a court dealing with these two offences at the same time cannot say whether at the end of a three months' period in a detention centre the prisoner will need probation. One of the matters that has to be considered is his character, and it must be his character at the time when the probation order becomes effective. In saying that, the court does not wish to throw any doubt on what is said to be the practice in regard to national service cases. It may well be then that, if there is only a short time before

the accused has served his full national service, it would be proper to make a probation order which would not become fully effective until he was released from the services. But in a case such as this where one is dealing with two offences and where for one offence he is placed wholly and entirely out of the control of the probation officer, it seems to this court that an order for detention and an order for probation are wholly inconsistent.

Accordingly, the result in the present case is that the court must quash the probation order which was made on the second count and substitute for that an order for detention in a detention centre for three months to run concurrently with the order made on the first count. In the result, the sentence of Borstal training itself which was imposed as the result of a breach of the probation order must also be quashed and the appellant discharged. It is quite clear that the appellant is a very lucky man in that if he had been committed, not for breach of probation, but for the offences for which he was fined in July he would undoubtedly have gone to Borstal training; but as the Borstal training was imposed on breach of the probation order and the probation order has gone, the sentence of Borstal training must itself be quashed.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

T.R.F.B.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., CASSELS AND BARRY, JJ.)

December 2, 1958

R. *v.* CHANDOR

Criminal Law—Sexual offence—Child—Alleged series of assaults by schoolmaster on several pupils—Summing up—How far succession of cases may be considered in determining truth of one incident.

The passage in *R.* v. *Campbell*, 120 J.P. 359, at p. 362, which states that on charges of sexual assaults on a number of children, where the evidence of each child deals only with the assault on himself or herself, "a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story" is not to be regarded as being of universal application. Though there are many cases in which evidence of a succession of incidents may properly be admissible to help to determine the truth of any one incident (e.g., to prove identity, intent or guilty knowledge, or to rebut a defence of innocent association), evidence of a succession of incidents cannot be relevant where the defence is that the meeting or occasion for the incident in question never took place at all.

APPEAL against conviction.

The appellant, a schoolmaster, was convicted at Croydon Quarter Sessions on five charges of indecent assault on boys and was sentenced to concurrent terms of six months' imprisonment. The alleged offences took place on five occasions between May, 1956, and June, 1958, and related to three different boys aged between 13 and 15. The appellant's defence was that none of the alleged incidents ever took place. With regard to an alleged offence against one boy at a particular place in the Lake District, the appellant's case was that he had never met the boy at that place at all; with regard to other alleged incidents, his case was that he had been in the company of the boy at the particular time and place where the offence was alleged to have been committed, but that

nothing in any way indecent had occurred. The recorder, in summing-up, directed the jury on the basis of a passage in the judgment of the Court of Criminal Appeal in *R.* v. *Campbell* (1) which stated that in cases of alleged sexual assaults on a number of children, where the evidence of each child dealt only with the assault on himself or herself, "a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story": see 120 J.P. 362. He had previously told the jury that there was no corroboration in any of the cases and had given them the appropriate warning. The appellant appealed on the ground that the direction of the recorder amounted to a misdirection.

N. N. McKinnon, Q.C., and *D. A. Hollis* for the appellant.
J. L. E. MacManus for the Crown.

The judgment of the court was delivered by

LORD PARKER, C.J.: This appellant was convicted at Croydon Quarter Sessions of five offences of indecent assault on boys and was sentenced to six months' imprisonment on each count concurrently. He now appeals against his conviction alleging a misdirection by the learned recorder.

The appellant is a man of 29 of excellent character. He was a schoolmaster at a secondary boys' school at Croydon, and the alleged offences took place on five occasions between May, 1956, and June, 1958, on three different boys aged 13 to 15 years. His defence from the outset and at the trial was that the alleged incidents never took place at all and that the boys' stories were mere products of their imagination. It is clear, therefore, from what I have said, that a most careful direction was needed on the admissibility of evidence of other incidents in determining the truth of any one incident. In the course of his summing-up the learned recorder pointed out, as indeed was right, that there was no corroboration in this case and he gave the jury the usual warning. He then continued in these terms:

> "Where there is a series of these incidents deposed to by witnesses of this kind, where you are told that a succession of these incidents happened, it may help you to determine the truth of the matter, provided that you are satisfied that there is no collaboration between the children to put up a false story. That is what the Court of Criminal Appeal has laid down in 1956 as a proper direction to give to a jury. You are entitled to take into account what Smith and Whibley have said in considering the evidence of Edwards, not as corroboration of what Edwards has said, because if there are a series of these incidents you may probably take the fact that there have been other incidents deposed to to help you to dispose satisfactorily of the issue, provided you are satisfied there has not been any collaboration between the children to put up a false story."

A little later on, he said:

> "I should also tell you there is another phase of the present case which you are entitled to take into account in dealing with any one incident; for example, in one of the assaults deposed to by Edwards you are entitled to take the evidence of the other witnesses into account, and that is in relation to any case where it can be said that the real defence was not 'I was not there; I never was anywhere near the place', but that this was a perfectly innocent meeting with the boy; you are entitled to take that into account to see whether that rebuts the defence of innocent behaviour."

(1) 120 J.P. 359; [1956] 2 All E.R. 272; [1956] 2 K.B. 432.

Those two passages in the summing-up were, undoubtedly, based on a passage in the judgment of the court in *R.* v. *Campbell* (1), a case dealing only with questions of corroboration, but at the end of the judgment LORD GODDARD, C.J., added this:

> "As we are endeavouring in this judgment to deal comprehensively with the evidence of children, we may perhaps endeavour to give some guidance to courts who have from time to time to deal with cases of sexual assaults on children where the evidence of each child deals only with the assault on himself or herself. In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B says that he was also the victim of a similar assault though both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided that they are satisfied there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, *R.* v. *Sims* (2), subsequently approved on this point by the House of Lords in *Harris* v. *Director of Public Prosecutions* (3) shows that such evidence can be given to rebut the defence."

The first part of that passage before the reference to a defence of innocent association is in very general terms. Unqualified, it would appear to cover a case where the accused was saying that the occasion for the incident in question never took place at all. To take an incident in the present case, the appellant said that, in respect of an alleged offence with a boy at View Point, he had never met the boy at View Point at all. Yet, if this passage in *R.* v. *Campbell* (1) is unqualified, it would apply to just such a case. We do not think that the passage in *R.* v. *Campbell* (1) was ever intended to cover that. Indeed, so far as we know the authorities have never gone as far as that, nor do we see how they could. Evidence that an offence was committed by the accused against B at Croydon could not be any evidence that the accused met A in the Lake District and committed an offence there. There are, of course, many cases in which evidence of a succession of incidents may properly be admissible to help to determine the truth of any one incident, for instance, to prove identity, intent, or guilty knowledge, or to rebut a defence of innocent association. On such issues evidence of a succession of incidents may be very relevant, but we cannot say that they have any relevance to determine whether a particular meeting or occasion for an incident ever occurred at all. That is sufficient to dispose of this case, and it is unnecessary to deal with the second passage in the summing-up in respect of a defence of innocent association. We would only observe that in the case of a schoolmaster and his pupil there may be nothing suspicious in the association which calls for explanation. However, having regard to the view we have taken as to the passage in *Campbell's* case (1) and the summing-up based thereon, it is unnecessary to deal with that. It follows that the conviction must be quashed and the appeal allowed.

Conviction quashed.

Solicitors: *Wilders & Sorrell*; *Director of Public Prosecutions.*

T.R.F.B.

(1) 120 J.P. 359; [1956] 2 All E.R. 272; [1956] 2 K.B. 432.
(2) [1946] 1 All E.R. 697; [1946] K.B. 531.
(3) 116 J.P. 248; [1953] 1 All E.R. 1044; [1952] A.C. 694.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., CASSELS AND MCNAIR, JJ.)

R. *v.* CUNNINGHAM

December 8, 1958

Criminal Law—Provocation—Defence applicable only to murder.

Criminal Law—Evidence—Character of prisoner—Imputation on character of Crown witness—Suggestion that witness invited prisoner to homosexual practices—Liability of prisoner to cross-examination on previous convictions—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1, *proviso* (*f*) (ii).

Provocation is available as a defence only on a charge of murder, and not on a charge of wounding or any other charge.

The appellant was about to dismount from an omnibus on which he had been travelling when one T., a passenger, whom he knew, made a remark to him which, on the face of it, was of a trivial and innocent nature. The appellant thereupon made a violent attack on T. At the appellant's trial for unlawfully and maliciously wounding T. it was suggested to T. in cross-examination by defending counsel that T. meant by the remark, and the appellant understood him to mean, that they were to go off together and indulge in homosexual practices. T. vehemently denied this. When the appellant gave evidence, the judge permitted prosecuting counsel to cross-examine him on his previous convictions.

HELD: that, as no defence of provocation arose in the present case, the question put to T. was an imputation on his character within the meaning of proviso (f) (ii) to s. 1 of the Criminal Evidence Act, 1898, which rendered the appellant liable to cross-examination on his previous convictions.

SEMBLE: even on a charge of murder where the defence of provocation does arise, a question of the nature put to the witness in the present case would render the prisoner liable to be cross-examined on his previous convictions.

APPEAL against conviction and sentence.

The appellant was convicted at Worcestershire Quarter Sessions of unlawful wounding and was sentenced to five years' imprisonment. The appellant was about to dismount from an omnibus on which he had been travelling, when one T., a passenger, whom he knew, said to him: "Oh, you are getting off here, Jack; I thought you were coming to Droitwich with me". The appellant then made a violent attack on T. At the trial it was suggested to T. in cross-examination by defending counsel that T. meant, and the appellant understood him to mean, that they were to go off together and indulge in homosexual practices. T. vehemently denied this. When the appellant gave evidence, the deputy-chairman permitted prosecuting counsel to cross-examine him on his previous convictions. It was contended on his behalf, that, assuming that provocation could be a defence to the charge, the question put to T. in cross-examination was not an imputation on his character within s. 1, proviso (f) (ii) of the Criminal Evidence Act, 1898, which would render the appellant liable to be cross-examined on his previous convictions.

R. H. Tucker for the appellant.

M. B. Ward for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: This appellant was convicted at Worcester County Quarter Sessions of malicious wounding and he was sentenced to five years' imprisonment. He now appeals to this court against his conviction and his sentence.

The short facts were these: The appellant was apparently travelling on a bus with his dog and had a cane or a whip with him, and as he moved to get off the bus he passed another passenger called Trueman, and according to the appellant,

Trueman said: " Oh, you are getting off here, Jack, I thought you were coming to Droitwich with me ". Thereupon the appellant made a most savage attack on Trueman, hitting him about the face and as a result he had a wound in the ear, abrasions on the hand and wrist and an injury to the left eye.

The defence put up at the trial was that that remark made by Trueman was intended as a suggestion that he, the appellant, should go with Trueman and commit some homosexual offence, and it was by reason of that that the appellant was provoked, as he said, and attacked Trueman. In the course of the trial, counsel for the appellant, in cross-examining Trueman, said this:

> " I must suggest that by that remark you meant and he understood you to mean that you were to go together and behave in a homosexual manner? A.—Well, really that is fantastic, and I think that it is incredible because do you think— "

Thereupon the deputy chairman quite rightly interrupted and asked counsel for the appellant if he realised where this question was leading. Counsel persisted and went on a little later:

> " Did I have your [Trueman's] answer to that question? A.—I said that it would be incredible that I should make any suggestion of any kind."

Then the deputy chairman wrote down the answer: " I did not suggest that he [the appellant] should go to Droitwich and behave in a homosexual manner ". As the result of that, when the appellant went into the witness-box the prosecution sought to cross-examine him as to his previous convictions, and the deputy chairman allowed that to be done with the result that previous convictions for violence, no less than four in number, were brought out and were before the jury.

The appeal is based on the ground that leave to the prosecution to cross-examine the appellant as to his previous convictions ought never to have been allowed. That is put forward in this way: that if provocation was a proper defence in an action of this sort, then counsel must be allowed to put that question to the complainant, the victim, without having the appellant's convictions brought out in court. I, for myself, think that even if provocation were a proper defence a question such as was put in this case must of necessity bring in the character of the prisoner, but it seems to this court to be unnecessary to determine that question because the court is quite clearly of opinion that in such a case as this, a case of malicious wounding, there is no such thing as a defence of provocation. The defence of provocation only arises in a murder case as a defence which will reduce murder to manslaughter. That, it seems to us, is made perfectly clear by VISCOUNT SIMON in *Holmes* v. *Public Prosecutions Director* (1). It is true that he says this:

> " The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived."

There VISCOUNT SIMON was dealing and dealing only with a defence of provocation in a murder case. The matter is put perfectly clearly by him where, after referring to the fact that provocation may reduce murder to manslaughter, he goes on:

> " In the case of lesser crimes, provocation does not alter the nature of the offence at all: but it is allowed for in the sentence."

(1) [1946] 2 All E.R. 124; [1946] A.C. 588.

Accordingly, in the judgment of this court the defence of provocation was not open to this appellant, and if the defence of provocation was not open to the appellant there was no defence, and the fact that his convictions were before the jury could have made no difference at all.

I should mention that there is yet another difficulty in the way, viz., that even if provocation could be a defence there is no suggestion that words alone, except in the case of the Homicide Act, 1957, are sufficient to found a defence of provocation. For these reasons the appeal against conviction is dismissed.

As regards the appeal against sentence, it is true that the appellant was given the maximum sentence, but having regard to his record of violence, there was no surprise in that. Both appeals accordingly are dismissed.

Appeal dismissed.

Solicitors: *Philip Baker & Co.*, Birmingham; *Thomas Horton & Sons*, Bromsgrove.

T.R.F.B.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., CASSELS AND MCNAIR, JJ.)

December 15, 1958

R. *v.* COX

Criminal Law—Sentence—Corrective training—Two previous convictions—Prisoner placed on probation by quarter sessions—Two subsequent convictions at different courts—Prisoner brought back to quarter sessions for sentence—Sentence of corrective training imposed—Criminal Justice Act, 1948 (11 *and* 12 *Geo.* 6, *c.* 58), *s.* 8 (5).

By s. 8 (5) of the Criminal Justice Act, 1948: "Where it is proved to the satisfaction of the court by which a probation order . . . was made . . . that the person in whose case that order was made has been convicted and dealt with in respect of an offence committed during the probation period . . . the court may deal with him for the offence for which the order was made, in any manner in which the court could deal with him if he had just been convicted by or before that court with that offence."

In June, 1958, the appellant pleaded Guilty at quarter sessions to house-breaking and larceny, and was placed on probation for three years. In August, 1958, he committed two offences of larceny and was sentenced to terms of imprisonment by different courts on two different occasions. He was brought back to quarter sessions in view of his breach of probation, and in September, 1958, was sentenced to three years' corrective training for the original offence. When the offence was committed, he was not eligible for corrective training and became eligible only if the two subsequent offences and convictions were taken into account.

HELD: that, in view of the language of the section, quarter sessions was entitled to take into account the two convictions after the appellant had been placed on probation and to pass a sentence of corrective training accordingly.

APPEAL against sentence.

On June 23, 1958, the appellant pleaded Guilty at Bedfordshire Quarter Sessions to a charge of house-breaking and a probation order was made for three years. Subsequently he stole 9s. from a meter, for which he was sentenced to three months' imprisonment, and tins of fruit from a lorry, for which he was

sentenced to six months' imprisonment. The convictions took place on different occasions and at different courts. As a result of those convictions he was brought back to quarter sessions for breach of probation, where he was sentenced to three years' corrective training for the original offence. When the original offence was committed the appellant was not eligible for corrective training. He became eligible only if one took into account the two offences committed after he was put on probation.

No counsel appeared.

The judgment of the court was delivered by

LORD PARKER, C.J.: This appellant pleaded Guilty in June, 1958, at Bedfordshire Quarter Sessions, to house-breaking, and a probation order was made for three years. Thereafter he was in trouble twice. He stole 9s. from a meter at his lodgings. That was not discovered at once, but ultimately he was given three months' imprisonment for that, and on Aug. 15, with four other men, he was caught stealing tins of fruit from a parked lorry, and for that he was sentenced to six months' imprisonment. He was later brought back before quarter sessions in respect of the breach of the probation order, when the chairman sentenced him to three years' corrective training, and it is against that sentence that the appellant appeals to this court. The only point in this case arises from the fact that at the time when the original offence was committed for which he was put on probation he did not qualify for corrective training, and he now qualifies only if one takes into consideration the two offences committed after he was put on probation. Accordingly, the point is whether it was correct to sentence him to corrective training for an offence for which in fact he could not originally have been given corrective training. It seems to the court that the point is entirely covered by s. 8 (5) of the Criminal Justice Act, 1948, which provides that in such a case as this the court may deal with the offender for the offence for which the probation order was made in any manner in which the court could deal with him if he had just been convicted by or before that court of that offence. It seems to this court that that sub-section entirely covers this case and that in principle it is right, because, when a court sentences a man, it must sentence him in the light of all the knowledge which the court then has, which in this case would include the fact that since the appellant was put on probation he had twice been sentenced to imprisonment. Accordingly, this appeal is dismissed.

Appeal dismissed.

T.R.F.B.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., CASSELS AND MCNAIR, JJ.)

December 15, 1958

R. *v.* LASHBROOKE

Criminal Law—Trial—Plea—Indictment containing three counts—Plea of Guilty to two and Not Guilty to one—Jury present in box, but not sworn—Jury sworn after plea and trial proceeded with—No objection or request for warning by defending counsel—Validity of conviction.

The appellant pleaded Guilty to the first and third counts of an indictment and Not Guilty to the second. During arraignment the jury were in the box waiting to be sworn and after the plea they were sworn to try the second count, there being no objection by defending counsel and no juror being challenged. Defending counsel did not request the judge to give the jury a warning, when considering their verdict on the second count, to disregard the pleas of Guilty to the first and third counts. The jury convicted on the second count.

HELD: that, if what happened was to be regarded as an irregularity, it was the duty of counsel to direct the attention of the court of trial to it timeously, and, as that had not been done, the conviction would not be interfered with on appeal.

R. v. *Darke* (1937) 26 Cr. App. R. 85, distinguished.
R. v. *Neal*, 113 J.P. 468; [1949] 2 All E.R. 438; [1949] 2 K.B. 590 referred to.

APPEAL against conviction.

The appellant was indicted before the County of Chester Quarter Sessions on an indictment containing three counts. To the first count of shop-breaking and larceny he pleaded Guilty; to the second count, which was another charge of shop-breaking and larceny, he pleaded Not Guilty; and to the third count of shop-breaking with intent, he pleaded Guilty. At the time when he so pleaded there were twelve jurors in the jury box waiting to be sworn. When he pleaded Not Guilty to the second count, the jury was sworn. He was tried on that count and was convicted. No challenge to any juror was made by defending counsel, nor was the chairman asked to give a specific warning to the jury, when considering count two, to disregard the appellant's pleas on counts one and three. The court was asked to quash the conviction on the second count on the ground that the jury must have known the appellant's antecedents through his plea of Guilty to the first and third counts and on the ground that the jury was not warned that any knowledge derived from those pleas ought to be disregarded.

Butter for the appellant.
D. Morgan Hughes for the Crown.

The judgment of the court was delivered by

LORD PARKER, C.J.: This appellant appeals to this court both against conviction and sentence. The matter arises in this way. He was indicted before the County of Chester Quarter Sessions on an indictment containing three counts. To counts 1 and 3, which concerned shopbreaking and larceny in one case and shopbreaking with intent in the other, he pleaded Guilty. To the second count, which was again a charge of shopbreaking and larceny, he pleaded Not Guilty. At the time when he did that there were twelve persons in the jury box ready to be sworn. After the appellant's plea of Not Guilty on the second count they were sworn and he was tried and duly convicted. He was sentenced to four years' imprisonment on each count to run concurrently. In those circumstances counsel has asked this court to quash the conviction on the second count on the ground that the jury must have known the appellant's antecedents through his plea

of Guilty to the two counts and that they were not warned by the chairman that they ought to disregard any knowledge they had in regard to those pleas.

One thing is perfectly clear, and that is that it is quite impracticable to ensure that no person who subsequently is sworn as a juryman knows nothing about the case. Even if the jury, as commonly they are, are waiting to be sworn and at the back of the court, they may well, if they are listening, hear pleas of Guilty. To suggest that they should be kept outside the courtroom altogether is, we think, perfectly idle. Indeed, even if they were, they might have read about proceedings in the magistrates' court or about sentences already imposed on pleas of Guilty. Nor do we think that it can be said that in every case where a juryman might have some knowledge of the prisoner's antecedents a warning should be given that the jury are to disregard them. Indeed, there may be many cases where to draw attention to that would do more harm than good. After all, most juries by now know that they are to decide the case on, and only on, the evidence given before them. Of course, the position may well be different after a jury have been sworn. Indeed, that was the position in *R.* v. *Darke* (1), to which the court has been referred. In that case the clerk of the peace, in giving prisoners in charge to the jury, informed the jury that the two prisoners were charged on an indictment containing three counts, to two of which they had pleaded Guilty. This court in that case said what is undoubtedly true, that that course taken by the clerk was highly irregular. Again, even if a prisoner charged on three counts and having pleaded originally Not Guilty then proceeded to change his plea on two of the counts to Guilty, it could not be suggested that the jury had to be discharged and the trial continued before a fresh jury. Provided the counts are properly joined there is, in the opinion of this court, nothing to prevent the trial going on, though no doubt in such a case the judge or recorder or chairman would warn the jury that they must deal with each case separately.

So far as the present case is concerned, it is perfectly clear that the prisoner and his counsel knew full well that there were twelve persons in the jury box waiting to be sworn who had heard the pleas, yet no juryman was challenged, nor was objection taken by counsel, nor did counsel invite the chairman to give any specific warning to the jury, all of which shows that he, at any rate, did not think that there was any irregularity or that there would be any prejudice to the prisoner. Indeed, if he had, it would have been his duty to draw the attention of the chairman to the fact. It was said in *R.* v. *Neal* (2) by LORD GODDARD, C.J.:

> " We desire, however, to emphasise that if an irregularity arises in a trial which can be cured and it is not brought timeously to the attention of the court of trial, it does not by any means follow that this court will allow advantage to be taken of it when it is too late to remedy it except by quashing the conviction."

In the circumstances of this case the court sees no ground whatsoever to interfere.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, for *Keith Moore*, Chester; *Kinch & Richardson*, for *Percy Hughes & Roberts*, Birkenhead.

T.R.F.B.

(1) (1937), 26 Cr. App. R. 85.
(2) 113 J.P. 468; [1949] 2 All E.R. 438; [1949] 2 K.B. 590.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., CASSELS AND MCNAIR, JJ.)

December 16, 1958

Re HUNT

Arrest—Privilege—Persons attending court—Litigant in person—Arrest in court and committal to prison for contempt.

The so-called privilege from arrest which is afforded to persons attending court, including parties, witnesses, barristers and solicitors, is a power which every court has to ensure that justice is done in the court and that persons properly in the court are not interfered with by being prevented from assisting the court and carrying on their business there. Where, however, a litigant in person is arrested in court and committed to prison for contempt of court on the order of the court before which he is appearing, he cannot claim privilege from arrest.

APPLICATION for habeas corpus.

The applicant, Kenneth Douglas Hunt, applied for a writ of habeas corpus ad subjiciendum directed to the governor of Brixton Prison and Allied Bakeries, Ltd., the respondents, the applicant being detained in Brixton Prison for contempt of court. The main ground of the application was that the applicant was wrongfully arrested for contempt. On Nov. 4, 1958, the respondent Allied Bakeries, Ltd., moved before WYNN-PARRY, J., for an order to commit the applicant to Brixton Prison for contempt of court in failing to comply with an order dated Dec. 3, 1957, pursuant to which the applicant was ordered to attend an examination, on July 17, 1958, on his means of paying the costs arising out of an action between the applicant and Allied Bakeries, Ltd., which the applicant failed to attend; in that action the applicant was the plaintiff and was appearing in person. WYNN-PARRY, J., being satisfied that the applicant had no intention of attending any examination as his means which might be fixed, thereupon ordered him to be committed to Brixton Prison and the tipstaff who had arrived in court arrested the applicant and took him to the prison. The applicant now contended that he was wrongfully arrested since he was a litigant in person and was committed for ordinary, as opposed to special, contempt and that for those reasons he was privileged from arrest within the precincts of the Law Courts.

The applicant appeared in person.

Rodger Winn for the governor of Brixton Prison.

Gillis, Q.C., and *W. E. Denny* for Allied Bakeries, Ltd.

LORD PARKER, C.J.: The applicant in this case was committed on Nov. 4, 1958, to Brixton Prison for contempt in disobeying an order of the court. He now applies to this court in person for a writ of habeas corpus. He has raised every conceivable point, but there is no doubt that the one which has been developed at greatest length and the one with which this court is really concerned, goes to whether he was properly arrested. [HIS LORDSHIP stated the facts and continued:] In these circumstances the applicant says that he was wrongfully arrested. He claims that he had some privilege from arrest while he was in the court. That is the first point which he takes. He takes some four or five other points, all of which admittedly have been raised by him on an appeal to the Court of Appeal from WYNN-PARRY, J.'s judgment. He says that some of the points were not dealt with by the Court of Appeal. That no doubt is so. If one reads the judgment, it appears that point after point was taken before the Court of Appeal, as indeed have been taken before this court. The fact that the Court of Appeal did not deal with all of them expressly does not mean to say they had any doubt on the matter, because the appeal was dismissed, and therefore every

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point which he took before the Court of Appeal was decided, whether expressly or impliedly, against him. It may be that that decision of the Court of Appeal is res judicata in these proceedings, but I find it quite unnecessary to decide that and, for my part, approaching the matter de novo and having heard all the arguments raised by the applicant, I see no reason, even if I am at liberty to do so, to come to any other view than that taken by the Court of Appeal. Accordingly, so far as all his points other than that concerning privilege from arrest are concerned, in my judgment the applicant completely fails.

The question regarding the privilege from arrest is quite an interesting one, on which one would expect to find clear and definite authority in the text-books. The applicant contends that in a case of ordinary contempt, such as merely disobeying an order of the court, a litigant before the court has complete immunity from arrest while in the precincts of the court. In the case of special contempt, which he would class as contempt in the face of the court and criminal contempt, he would agree there is no privilege against arrest within the precincts of the courts. Accordingly he complains that he was wrongfully arrested in WYNN-PARRY, J.'s court and he is wrongfully detained in Brixton Prison.

I find it unnecessary to go through all the history of the matter. It is a misconception to talk about a litigant or a solicitor or a witness having immunity from arrest while within the precincts of the court. The truth is that the privilege, if privilege there be, is a privilege of the court to be sure that justice is done in court, and for that purpose to prevent anybody properly before the court from being arrested. That seems perfectly clear if one looks at one or two of the authorities. If one goes back to 1778, it will be seen in *Cameron* v. *Lightfoot* (1) that this matter was fully dealt with, and DE GREY, C.J., in that case said this:

> "The question therefore is, whether the privilege of the King's Court, extended to suitors redeundo, so vitiates an arrest, or suspends the operation of the writ, that the taking a man thereon becomes an act of trespass to the party taken. The ancient way of availing oneself of the privilege of the courts was by suing out a writ of privilege for suitors, jurors, and witnesses. But this privilege is not considered as the privilege of the person attending the court, but of the court which he attends."

There the matter is being dealt with, as I have said, not as a privilege of the litigant but as something which the court has power to do in order that there should be a proper administration of justice. Again, in the Consolidated Orders in Chancery of 1860 it was provided by Ord. 42, r. 1:

> "Officers and attendants upon the court, suitors and witnesses, are to have privilege eundo, redeundo, et morando, for their necessary attendance, but not otherwise; and where any of them are arrested at such times of necessary attendance, it is a contempt of court."

True, those Orders in Chancery were repealed in 1883, but it has always been assumed that whether by reason of R.S.C., Ord. 72, r. 2, or indeed at common law the rights that existed before 1883 remain.

It is also to be observed that in CHITTY'S ARCHBOLD'S PRACTICE OF THE QUEEN'S BENCH DIVISION (1885 Edn.), Vol. 2, at p. 1484, the matter is put perfectly clearly. It says this:

> "Every person connected with a cause, and attending in the course of it, whether compelled to attend by process or not, such as parties, witnesses, bail, solicitors, etc., are privileged from arrest whilst going to, attending, and returning from court, or the judges' chambers."

(1) (1778), 2 Wm. Bl. 1190.

Then it goes on to provide that barristers have the same immunity. A little later on it says:

> "It is not considered as the privilege of the person attending the court, but of the court which he attends."

At p. 1487 it is laid down that where an arrest has been made in court and complaint is made of that arrest, the complaint is made to the judge in question. It is perfectly clear from that that it is a privilege of the court and in DANIELL'S CHANCERY PRACTICE (8th ed.), vol. 1, it is stated at pp. 776 and 777 in much the same terms:

> "Officers and attendants upon the court, suitors, and witnesses are to have privilege eundo redeundo et morando for their necessary attendance, but not otherwise, and when any of them are arrested at such times of necessary attendance it is a contempt of court. A solicitor who is proceeding to the court to attend to his professional business there pending is privileged from arrest; and the question in such cases is, whether, at the time of his arrest, he was bona fide proceeding in a direct line to or from the court. The solicitor is also privileged if he is on his way to attend an appointment at the offices of the court. If the first arrest is bad, all the detainers lodged under it are also bad. The application to discharge must be made to that court of which the arrest is a contempt."

From those authorities and text-books, it seems to me to be perfectly clear, as indeed one would expect, that this so-called privilege from arrest is a power which every court has inherently to see that justice is done in the court, and for that purpose that people properly in the court are not interfered with by being arrested and prevented from assisting the court and carrying on their business in the court. In so far as it is said to be a privilege of the person attending the court, the privilege is no more than this, that they are entitled to rely on the judge of that court to see that justice is not interfered with by their being arrested. There is nothing to suggest that a person is privileged from arrest in a court if the arrest is done on the order of that court; indeed, it would be very surprising if that were not so. The truth of the matter is that certainly before 1893, as is shown by Mr. Registrar LAVIE'S note in *Re Evans* v. *Noton* (1), it has always been the practice for a person who is committed by the court to be arrested in court, not only if he has been guilty of what is called special contempt, but also in the case of ordinary contempt, though he is properly before the court. Accordingly, in my judgment there is nothing in the applicant's point in regard to wrongful arrest. In these circumstances, I would refuse this application.

I should perhaps add that I have deliberately avoided the debate as to how far this court sitting as a Divisional Court can inquire into matters of committal. It may be that the true view is, and I think that the cases support it, that though this court always has power to inquire into the legality of the committal, it will not inquire whether the power has been properly exercised. However, in this case I am quite satisfied that the application fails.

CASSELS, J.: I agree.

McNAIR, J.: I also agree. *Application refused.*

[An order for the costs of the application was made in favour of Allied Bakeries, Ltd., and an order for costs of a nominal amount of 10s. was made in favour of the Governor of Brixton Prison.]

Solicitors: *Treasury Solicitor; A. Kramer & Co.* T.R.F.B.

(1) [1893] 1 Ch. 252.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND HEWSON, J.)

October 31, November 3, 1958

JOHN *v.* JOHN

Husband and Wife—Maintenance order—Discharge—Application to vary or discharge made to different magistrates' court—Transmission of information by original court to new court—Magistrates' Courts Rules, 1952 (*S.I.* 1952 *No.* 2190), *r.* 34 (2), (7).

Where an application to vary or discharge an order made by justices is made in a petty sessional division other than that in which the order was made the clerk to the original court should transmit to the new court with the complaint such information about the case as, in his opinion, it would have been desirable for the original court to have if it had been dealing with the application.

APPEAL by the husband from an order of the justices for the Long Aston petty sessional division of Somerset, sitting at Flax Bourton, whereby they dismissed his complaint to discharge or vary an order made by the justices for the petty sessional division of Aberavon, sitting at Port Talbot, Glamorganshire.

By the original order, which was made against the husband on the ground of desertion, the wife was given custody of a child of the marriage and was granted maintenance at the rate of £2 10s. a week for herself and £1 10s. a week for the child. By his complaint the husband sought to have the order discharged or varied on the ground that he had fresh evidence, within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, to show that he was not the father of the child. The "fresh evidence" on which the husband relied was a letter alleged to have been written by the wife to her relatives. The justices ruled that there was no case to answer.

At the hearing of the complaint, except for the evidence of the husband that he had denied the paternity of the child in the proceedings before the Aberavon justices, there was no information whatever before the Long Aston justices in regard to the hearing before the Aberavon justices.

P. A. Webster for the husband.
Moylan for the wife.

LORD MERRIMAN, P.: I want to say a word about a feature of this case which is not without importance. As is well known, until recently, applications to vary or discharge an order had to be made to the petty sessional division which had made the original order, but now, since the Magistrates' Courts Act, 1952, was passed, and, in particular, since the making of r. 34 of the Magistrates' Courts Rules, 1952, it is possible, as in this case, to make the application to another petty sessional division. By r. 34 (2), which is the operative paragraph of the rule, a complaint for the revocation, discharge, revival, alteration or variation of an order enforceable as an affiliation order may be made to a justice acting for the same petty sessional area as the court which made the order (which court is referred to as "the original court"), or to a justice acting for the petty sessional area where the complainant is for the time being. Rule 34 (7) reads:

> "Where a complaint to which this rule applies is made to a justice of the peace acting for a petty sessions area other than that for which the original court acted, the justice shall cause the clerk of the magistrates' court acting for that other petty sessions area to send the complaint and the said particulars by post to the clerk of the original court; and the clerk of the original

court shall bring the complaint before the court; and thereupon paras. (4) to (6) of this rule shall have effect as if the complaint had been made and the particulars furnished to a justice of the peace acting for the same petty sessions area as the original court."

I wish particularly to call attention to a note to r. 34 (4) in STONE'S JUSTICES' MANUAL (90th ed.) (1958), at p. 2664, setting out a Home Office circular relating to this particular jurisdiction. The note reads:

"It is pointed out in Home Office Circular (278/1947) that it is desirable in order that the other court [that is, the new court] may be in a position to deal with the matter that any necessary further information should be transmitted at the same time as the complaint is sent . . . where the application is for variation of some other provision of the order [that is, other than the mere amount] the court would also be helped by knowing the circumstances in which this provision was included in the order. It will be for the clerk of the transmitting court to decide what information should be sent with the complaint in any individual case, but the Secretary of State would suggest that the guiding principle should be that such information should be sent as it would in his opinion be desirable that the original court should have, if it were dealing with the complaint."

There is not a single piece of information of any kind available in this case about what happened at the hearing before the Aberavon justices with this exception, that the husband stated in evidence before the Long Aston justices that he had denied the paternity at the hearing before the Aberavon justices. Manifestly that is an important circumstance, because, if he had admitted the paternity on that occasion or had done something which estopped him from raising the point afterwards, that would be a matter, no doubt, of considerable importance in applying the rule about fresh evidence. As the matter stands before us, we have the record of the husband's evidence that he had denied the paternity at the hearing before the Aberavon justices. I have called attention to this matter so that, when there is, as I think that there inevitably must be, a re-hearing by the Long Aston court, an attempt will be made to rectify this omission, so that whatever record is available of what happened at the hearing before the Aberavon justices on the first occasion may be made available to the Long Aston justices.

[The DIVISIONAL COURT allowed the appeal, set aside the order dismissing the husband's complaint and remitted the complaint for re-hearing by a fresh panel of justices for the Long Aston petty sessional division.]

Solicitors: *Le Brasseur & Oakley*, for *Wehrle & Sheehan*, Port Talbot; *Haslewoods*, for *E. J. Watson, Cox & Counsell*, Bristol.

G.F.L.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND STEVENSON, J.)

January 19, 1959

CLAXTON *v.* CLAXTON

Husband and Wife—Appeal by wife to Divisional Court—Case sent for re-hearing before new panel of magistrates on questions of fact—Right of wife's counsel to read judgment of Divisional Court to court on re-hearing.

On Apr. 18, 1957, complaints by the wife against the husband of desertion and wilful neglect to maintain her were dismissed by a court of summary jurisdiction. The wife appealed and on Oct. 17, 1958, the Divisional Court ordered a re-hearing of the case before a fresh panel of magistrates as it considered different inferences of fact should have been drawn from the evidence from those which were drawn by the court below. On Dec. 29, 1958, when the case was before the new panel of magistrates, counsel for the wife attempted to read the Divisional Court judgments, but the magistrates refused to hear what the Divisional Court had said until they had heard the evidence and drawn their own conclusions therefrom. On an appeal by the wife against this ruling.

HELD: (i) there was the widest possible distinction between Divisional Court judgments where magistrates had erred on points of law and where they had drawn wrong inferences of fact, and the magistrates were right in taking the view they did as the case was one of pure fact, and, at a trial de novo, it was proper to exclude inferences of fact drawn in the past either by another court of summary jurisdiction or by the Divisional Court; (ii) it was the duty of the clerk of the court, who alone knew the judgments of the Divisional Court on questions of fact, to keep those judgments secret to ensure a fair and proper trial.

APPLICATION by a wife for directions in relation to a re-hearing before justices of the petty sessional division for Kingston-upon-Hull on Dec. 29, 1958, of a complaint by her against her husband on the ground of desertion and wilful neglect to maintain her. There had been an appeal to the Divisional Court in June and October, 1958, and the court had directed a re-hearing, basing their decision on inferences of fact and interpretation of the evidence before the magistrates' court. The justices at the re-hearing ruled that they would not read the judgment of the Divisional Court before they had drawn their own conclusions from the evidence before them.

Mrs. E. K. Lane for the wife.

J. S. Taylor for the husband.

LORD MERRIMAN, P.: This was a case in which the stipendiary magistrate for the City of Kingston-upon-Hull had dismissed the wife's complaints of desertion and wilful neglect to maintain. The real fight was on the subject of desertion, whether, as the wife complained, she had or had not been expelled from the matrimonial home by conduct which, putting it in the shortest possible way, was said to be ill-treatment by her mother-in-law, condoned or acquiesced in without any protection afforded to her by the husband. The learned magistrate came to the conclusion that the wife had not made out her complaint, and we had a very full trial before this court which included, amongst other things, an attempt to bring about a reconciliation, which was abortive. Looking back at my notes I see that we had before us a transcript of the evidence before the stipendiary magistrate and a certain amount of correspondence. Of one thing only we had no transcript, or copy, and that was the evidence of the husband, because he was not called to give evidence, in spite of figuring as the passive encourager, so it was suggested, of the treatment meted out to the wife by his mother.

The learned magistrate had taken a view of the case based on his interpretation of the evidence, which was set out at considerable length, in a very careful judgment; we took a different view, and, indeed, in certain respects on particular points we differed explicitly from his view as to the effect of the evidence. From first to last, however, the question was purely one of the true inferences to be drawn on the facts as we saw them, which, of course, was only at second-hand from a very full note and after hearing very full argument. We decided that the case called for a re-hearing, and it was made abundantly clear, in unmistakable language, by STEVENSON, J., who delivered the first judgment, with which, as I said, I wholeheartedly agreed, that the observations that we had made in support of our view that different inferences of fact should be drawn from those which had been drawn by the stipendiary magistrate were not intended in any way to prejudice the re-hearing by a fresh panel, who would come to their own conclusion.

When the case came on it was attempted in the opening on behalf of the wife to read our judgment, and the magistrates expressed the view that they wished, or thought they ought, to have an unprejudiced view of the evidence, without the matter being in any way hampered, or assisted, as the case may be, by anything which we had said on the interpretation of a transcript.

We are asked to say that this creates a dangerous precedent, and that it is of vital importance that a public judgment, as a judgment of this court is, should not be concealed artificially from the magistrates when the matter comes on for re-hearing. I think, for my part, that this is not a matter about which a general pronouncement can be made: everything depends on the nature of the particular case. In the first place, I draw the widest possible distinction between a judgment of this court which points out that the magistrates have gone wrong in this or that particular as a matter of law and a judgment in a case which depends solely on inferences on fact. In cases involving matters of law (and they, of course, form the very great majority of the cases in which we do order a re-hearing) there can be no question that the magistrates have the right—indeed, they are under the duty—to see in what respect we think that the first magistrates' court misdirected themselves in matters of law, so that they may avoid falling into the same pitfall; of that there can be no doubt at all. But the position is different when a case is purely one of the inferences of fact which are to be drawn from this piece of evidence or that piece of evidence. We did say in this case, and we often say in other cases, that with regard to the inferences of fact we have no wish at all to prejudice the re-hearing but are only trying to show sufficient grounds for having ordered a re-hearing; and we should, I think, be making a pretence of that, and turning it into a mere formula, if we were to force magistrates, who wish to form their own view, to read what we said about the various questions of fact.

It is said that to take this view of the matter puts an impossible burden on the court, on counsel and on advocates generally, because it is impossible to know where the line should be drawn. Well, it is a very long time since it was first said (and the instance which I have in mind is one in which it was said by LORD BLACKBURN) that it may be very difficult to know where to draw the line but it may be very easy in any given case to say that that case is on one side or the other of any line that can reasonably be drawn. In this case it is perfectly easy to say that it stands unquestionably on the side which is one of pure fact and no law, rather than on the side where there is some law but a good deal of fact, and a very, very, long way indeed from a case where the decision to upset the judgment in the first trial depended solely on a matter or matters of law alone.

I think that the magistrates were right in taking the view that they would try the case better if they did not have our judgment read. We have read it very carefully and had it read to us, and I think that they were right in that view, but I want to say this by way of caution: if in the course of the hearing any reference is made to any supposed point on which we are alleged to have expressed an opinion, or if any attempt is made to drag in any part of the very full and careful reasoning of the magistrate about a question of fact, then in my view the whole thing would be open, and the magistrates would not only be entitled but would be bound to let in what we said about the case. Provided, however, that the case is tried as it should be, de novo, and without reference to inferences which may have been drawn in the past, either by the stipendiary magistrate or by this court on the questions of fact, I think that this judgment should remain where it is. The secret is, I imagine, only known to the clerk of the court, who will be able to ensure that there is fair play all round.

STEVENSON, J.: I entirely agree, and I only want to add a few words by way of emphasis, lest anyone may in future seek to suggest as a general proposition that judgments of this court should not be revealed to magistrates who are charged with the task of re-hearing a case remitted by this court.

The question at issue in this case is whether or not this husband constructively deserted his wife. In the course of the hearing before the stipendiary magistrate at Hull the husband was not called. The evidence of the husband was in our view essential to the determination of the question which that court had to decide, and it is important to observe that counsel for the husband appearing in this court conceded that there must be a re-hearing. In those circumstances, the judgments delivered in this court consisted almost entirely of discussion of and comment on the evidence before the learned magistrate, which are designed to explain or to justify the order for the re-hearing, which was already a matter of concession. I have said this in order to emphasise that these judgments consist of comments on facts, and nothing else.

It is the task of the justices who form the panel engaged in re-hearing this case to try those very facts, one hopes on evidence which will be complete, and on which they will have a full opportunity of making up their own minds. In those circumstances, I think they were manifestly right not to consider and permit to be read before them the judgments of this court, which are, indeed, qualified by the observation that they are not intended to prejudice the re-trial of the issues in this case by the fresh panel of justices.

As my Lord has pointed out, utterly different considerations must arise where a judgment is based on any proposition of law, or any direction on a matter of law in relation to which the court of trial has gone wrong, because, of course, the magistrates who have to re-hear such a case must always direct themselves with reference to the judgments which have been delivered in this court.

For these reasons I am quite satisfied that this application must be dismissed.

Application refused.

Solicitors: *Kingsford, Dorman & Co.*, for *Gosschalk, Austin & Wheldon*, Hull; *Thompson, Cook & Babington*, Hull.

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN and ASHWORTH, J.J.)

January 19, 1959

JONES *v.* EALING BOROUGH COUNCIL

Town and Country Planning—Enforcement notice—Quashing by magistrates—Right of appeal—"Person aggrieved"—Local authority—No order for costs against, or legal burden placed on, authority—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51). *s.* 23 (5).

Where an enforcement notice served by a local authority under s. 23 of the Town and Country Planning Act, 1947, has been quashed on appeal by a magistrates' court under sub-s. (4), and no order for costs has been made against the authority and no legal burden placed on it, the authority is not a "person aggrieved" by the decision of the magistrates' court within the meaning of sub-s. (5) and so has no right of appeal to quarter sessions. The authority does not become a "person aggrieved" merely by reason of the fact that it has been frustrated in the performance of its public duty.

CASE STATED by the Appeal Committee of Middlesex Quarter Sessions.

On Dec. 12, 1957, the respondent, Ealing Borough Council, the local planning authority, served on the appellant, Mr. John James Jones, an enforcement notice relating to the use of a site in Ealing for the parking of motor vehicles. Mr. Jones appealed to the magistrates' court at Brentford against the notice. The local planning authority alleged that the use of the site for the parking of motor vehicles was contrary to planning control. Mr. Jones maintained that the use for that purpose was a use before the appointed day and that accordingly no planning permission was required. On Feb. 14, 1958, the justices held that the use was not a new use, but existed before planning control, and accordingly quashed so much of the enforcement notice as related to the use of the land for the purpose of parking vehicles. No order was made as to costs. The local planning authority appealed against the magistrates' decision to the appeal committee of Middlesex Quarter Sessions before whom Mr. Jones contended that the local planning authority was not a person aggrieved within the provisions of the Town and Country Planning Act, 1947, s. 23 (4), (5). On Mar. 19, 1958, the appeal committee allowed the appeal. The question stated for the opinion of the High Court was whether they were right in holding that they had jurisdiction to hear the appeal.

B. J. Shaw for the appellant.

W. G. Wingate for the council.

LORD PARKER, C.J., after stating the facts, continued: Section 23 of the Town and Country Planning Act, 1947, provides, as is well known, for the serving of enforcement notices on the owner or occupier of land where the local planning authority considers that the user is in breach of planning control. Sub-section (4) of that section provides:

> "If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing sub-section, appeal against the notice to a court of summary jurisdiction . . ."

Pausing there, it will be seen that the powers of the court of summary jurisdiction are severely limited because the sub-section goes on to provide:

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" . . . and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates; . . ."

It is not necessary to read any more of the sub-section. Then by sub-s. (5) it is provided:

" Any person aggrieved by a decision of a court of summary jurisdiction under the last foregoing sub-section may appeal against that decision to a court of quarter sessions."

Accordingly, two points arise, first, whether the words " any person " in sub-s. (5) are words which in their context cover the local planning authority; and secondly whether, assuming that they are capable of including the local planning authority, the words " any person aggrieved " cover the case of a local planning authority whose enforcement notice has been quashed on the ground that the alleged development was a development for which no permission was required.

As to the first, whether a local planning authority can come within the expression " any person " in this Act, we have been referred to a number of sections where, it is true, a local planning authority is always specifically referred to in contrast to a person. On the other hand, it is to be observed that " any person " in s. 23 (5) is used in a general term as opposed to the words in sub-s. (4) " If any person on whom an enforcement notice is served ". It is also relevant to observe that the local planning authority under the statute may have to go to court and sue. An instance of that is s. 24 itself when one would expect that, if costs were given against the local planning authority, it would be able to say that it was an aggrieved person. For myself, I find it unnecessary to come to a final conclusion on that point, and I will assume for the purposes of this appeal that the words " any person " are capable in the section of including a local planning authority.

Coming, therefore, to the second question whether the local planning authority can be said to be aggrieved in the present case, I would like to make two general observations. First, I would like to voice a protest that Parliament continues to allow this expression to come into Act after Act of Parliament. As long ago as 1929, LORD HEWART, the Lord Chief Justice, referred to the fact that these words were so often used and that if one looked at the cases one could find some cases going one way and some cases going another. Notwithstanding that, the words continued to creep in after 1929 and continue to do so today. This is another case where Parliament has failed to make clear what was really intended by those words.

The second general observation that I would like to make is that so far as I know, and so far as I understand counsel in the case know, this is the very first case in which a local planning authority has claimed that it has the right to appeal to quarter sessions under s. 23. That does not mean that it may not have the right. As LORD HEWART, C.J., pointed out in the case to which I have already referred, *Sevenoaks Urban District Council* v. *Twynam* (1):

" But as has been said again and again there is often little utility in seeking to interpret particular expressions in one statute by reference to decisions given upon similar expressions in different statutes which have

(1) 93 J.P. 189; [1929] 2 K.B. 440.

been enacted alio intuitu. The problem with which we are concerned is not, what is the meaning of the expression 'aggrieved' in any one of a dozen other statutes, but what is its meaning in this part of this statute?"

Accordingly, for my part I only look at the cases to which we have been referred to see if there are general principles which can be extracted which will guide the court in approaching the question as to what the words "person aggrieved" mean in any particular statute.

It seems to me to be easier to say what will not constitute a "person aggrieved" than it is to say what "person aggrieved" includes. It is clear from the cases that a person aggrieved is not a person who is disappointed or annoyed at the decision, as was said by LORD GODDARD, C.J., in *R.* v. *London Quarter Sessions, Ex p. Westminster City Council* (1). Another case which had some, though not very direct, bearing on the matter was, he said, *R.* v. *London Justices* (2) where the question was whether the prosecutor in a quasi-criminal case, a matter affecting a highway, was a person aggrieved, and the court held that a prosecutor was never a person aggrieved. It was put that he might be annoyed at finding that what he thought was a breach of the law was not a breach of the law.

It seems to me also to be clear that a person is not aggrieved when that person being a public body has been frustrated in the performance of one of its public duties. The argument was advanced in that same case, on behalf of the Westminster City Council, that the council had a public administrative duty to perform in the regulation of the streets; and that, having been interfered with in the execution of that duty by the decision of the magistrate, they were persons aggrieved by his order within the meaning of s. 64 of the London County Council (General Powers) Act, 1947. It was submitted that Parliament intended that the words "person aggrieved" in the section should be read in their widest sense, and that they would clearly include persons who were frustrated in the performance of a public duty. That argument was not acceded to in that case (*R.* v. *London Quarter Sessions, Ex p. Westminster City Council* (1)), and accordingly I am satisfied that a mere annoyance because what was thought to be a breach of planning control turned out not to be a breach of planning control, and equally, the mere fact that this local authority charged with certain duties under the Town and Country Planning Act, 1947, has been frustrated in the performance of what it thought was its public duty, are not enough of themselves to make the local planning authority an aggrieved person. Approaching it from the other end: what is included in the words "aggrieved person"? If costs have been awarded in any case against a local authority, it is clear, I think, on the authorities that the local authority would be an aggrieved person as the result of the decision having involved an order for costs. Equally, if the result of the decision has been to put some legal burden on the public body concerned, that has been held to make them a person aggrieved, and in that connexion I would only mention the case which has been referred to, *R.* v. *Nottingham Quarter Sessions, Ex p. Harlow* (3) where this court held that the decision of the magistrates that an owner was not obliged to provide a dustbin involved that the council:

"... is left with a legal burden which, if the order of the court of summary jurisdiction had not been made, the council would have discharged";

in other words, the burden would have fallen on them to provide a dustbin.

(1) 115 J.P. 350; [1951] 1 All E.R. 1032; [1951] 2 K.B. 508.
(2) (1890), 55 J.P. 56; 25 Q.B.D. 357.
(3) 116 J.P. 397; [1952] 2 All E.R. 78; [1952] 2 Q.B. 601.

In the present case there has been no question of costs. In the second place, in my view, the effect of the decision has not been to put a burden in the sense of a financial burden on the local planning authority. It is true that it may be affected in some way by the decision in regard to rateable values, and it may be it will be affected if it chooses hereafter to take steps under s. 26, which I suppose would involve compensation, but in my view those are too remote contingencies to enable one to say within the principles laid down that the local planning authority is a person aggrieved.

Finally, I confess that, looking at the statute alone, one cannot help feeling that if Parliament had intended the local planning authority to be able to appeal it would have said so clearly. As ASHWORTH, J., pointed out in the course of the argument, by s. 100 (1) the Minister himself can if he thinks it is expedient serve an enforcement notice, " and any notice so served by the Minister shall have the like effect as a notice served by the local planning authority ". Accordingly, if the argument for the local planning authority here is correct, one would have what I confess is the surprising result that the Minister himself could be said to be a person aggrieved by the decision of the court of summary jurisdiction. In my judgment the Appeal Committee of Middlesex Sessions were wrong in law and this appeal should be allowed.

DONOVAN, J.: I agree. If one came to the expression " person aggrieved by the decision " without reference to judicial authority, one would say that the words meant no more than a person who had the decision given against him; but the courts have decided that the words mean more than that and have held that the word " aggrieved " is not synonymous in this context with the word " dissatisfied ". The word " aggrieved " connotes some legal grievance, for example, a deprivation of something, an adverse effect on the title to something, and so on, and I cannot see that that is so here. The local planning authority has simply been told that it cannot enforce the discontinuance of the present use of this land by the appellant. It cannot do so, that is, by means of an enforcement notice under s. 23 of the Town and Country Planning Act, 1947. It has been told, in other words, that the appellant here has and always has had the right to go on using the land in the way in which he at present uses it and so for the present the development plan must be modified. I say " at present " because there are provisions whereby the planning authority can in effect overcome the magistrates' decision, that is, under s. 26 and s. 27 of the Act. The local planning authority is not necessarily, therefore, even frustrated, and I think that the existence of this alternative power of control tends to support the view that Parliament did not think it necessary to confer on planning authorities a right of appeal from a magistrate's decision. It is quite true that compensation may have to be paid if the planning authority does exercise its powers under s. 26, but that burden would flow not immediately at any rate from the magistrates' decision but from a subsequent administrative decision of the local planning authority.

Counsel for the respondent says that planning authorities have important public duties and that that tends to support the view that they have a right of appeal from the magistrates' decision. I agree that the matter is important, but when this Act was passed in 1947 numerous decisions of the court were available to show that the expression was ambiguous. In those circumstances, one might reasonably think that, if Parliament wanted to confer a right of appeal because this matter was so important, it would have used words which placed the matter beyond all doubt, as it has done, for example, in s. 61 and s. 64 of the Income Tax Act, 1952, where the position of the subject and the

public authority in relation to an appeal from an inferior tribunal is made perfectly clear. There is force in the argument that almost invariably in this Act the local planning authority is called by that name and the better view is that Parliament would have done so in s. 23 (5) of the Act of 1947 if it had intended the local planning authority to have a right of appeal from the magistrates. Like LORD PARKER, C.J., I am also impressed by the point made by ASHWORTH, J., during the argument on s. 100 (1).

ASHWORTH, J.: I have arrived at the same conclusion and I have nothing that I can usefully add.

Appeal allowed.

Solicitors: *A. V. Hawkins & Co.*, Harrow; *Town Clerk*, Ealing.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND ASHWORTH, JJ.)

January 16, 1959

R. *v.* CITY OF LIVERPOOL JUSTICES. *Ex parte* W.

Adoption—Girl—Male adopter—No special circumstances specified in order—Duty of justices—Appointment of guardian ad litem—Report of court—Full facts not stated—Desire of grandmother to have custody omitted—Grandmother not made respondent to application—Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *s.* 2 (2) *—Adoption of Children* (*Summary Jurisdiction*) *Rules*, 1949-1952, *r.* 7; *r.* 9 (*d*).

In 1952 an illegitimate daughter was born to one W. The child lived with her mother in the home of the maternal grandmother till April, 1957. W. then went to live with a man named L. and took the child with her. In October, 1957, she married L., and died on Mar. 12, 1958. On Mar. 14, 1958, L. notified the welfare authority that he intended to make an application to adopt the child, who was still living with him. The local authority was appointed guardian ad litem for the purpose of the application. The maternal grandmother had been to see the child care officer who was in charge of the matter and told him that she disapproved of L. and wished to have custody of the child herself and that she was endeavouring to obtain legal aid for the purpose of having the child made a ward of court. In the report made by the local authority as guardian ad litem to the court under r. 7 of the Adoption of Children (Summary Jurisdiction) Rules, 1949, no reference was made to these matters, and no notice of the hearing of the application for the adoption order was served on the grandmother, though r. 9 (d) required that a person who, in the opinion of the court ought to be a respondent, should be served. On June 16, 1958, a juvenile court made an adoption order in favour of L. The order contained no reference to special circumstances or to s. 2 (2) of the Adoption Act, 1950, which provides that an order shall not be made in respect of a female infant in favour of a sole male applicant unless the court is satisfied that there are special circumstances which justify it. An application was made by the grandmother for certiorari to quash the adoption order on the ground that the justices had failed to have due and proper regard to s. 2 (2) of the Act of 1950. The justices did not file any affidavit.

HELD: that certiorari must issue as, in the absence of any affidavit from the justices, and having regard to the fact that in the order which they made they did not draw attention to any special circumstances, the court was bound to infer

that they had omitted to consider the provisions of s. 2 (2), and (without expressly deciding the point), possibly, on the further ground that the report by the child care officer was not in any sense a full report. Further, if a full report had been put in, the justices might well have considered that under r. 9 (2) as substituted by r. 3 of the Adoption of Children (Summary Jurisdiction) Rules, 1952), the application should have been served on the grandmother.

MOTION for order of certiorari.

In 1952, a daughter, Ann, was born to one H.W., the daughter of Mrs. E.H.W. The child was brought up by her mother and grandmother in Liverpool until April, 1957, when the mother went to live with a man named L. and took the child with her. In October, 1957, the mother and L. married, but on Mar. 12, 1958, the mother died. Two days later, L. gave notice to the welfare authority that he intended to apply to adopt the child, who continued to reside with him. About the same time the grandmother applied for legal aid in order to enable her to take proceedings to have the child made a ward of court. The local authority was appointed guardian ad litem of the child. On June 12, 1958, a report was submitted to the justices by a child care officer in which it was stated: "The natural grandmother seems not always to be clear as to the parentage of the infant, and has on a number of occasions picked up the infant from school and removed her to another part of the country. These happenings occurred while the mother of the infant was still alive, and they seem to have rather upset the infant, who is now very frightened of her natural relations, and if she sees them, or thinks she sees them, she runs into the house and hides." The grandmother had, in fact, been to see the child care officer and clearly conveyed to him that she would like the custody of the child and that she considered L. was unsuitable. The officer had also been informed that the grandmother was consulting a solicitor for the purpose. None of these matters, however, was mentioned in the report.

By s. 2 (2) of the Adoption Act, 1950: "An adoption order shall not be made in respect of an infant who is a female in favour of a sole applicant who is a male, unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order." By r. 7 of the Adoption of Children (Summary Jurisdiction) Rules, 1949: "It shall be the duty of the guardian ad litem to investigate as fully as possible all circumstances relevant to the proposed adoption with a view to safeguarding the interests of the infant before the court, and to make a report to the court for that purpose . . ."

On June 16, 1958, Liverpool Juvenile Court made an adoption order in favour of L. The order contained no reference to special circumstances or to s. 2 of the Act of 1950. Leave was obtained on behalf of the grandmother to apply for an order of certiorari to bring up and quash that order on the ground that the justices had failed to have due and proper regard to s. 2 (2) of the Act of 1950 in making it. The justices did not file any affidavit.

Bickford Smith for the grandmother.

J. G. Burrell for the guardian ad litem.

LORD PARKER, C.J.: In 1952 a daughter, Ann, was born to Hazel W., the daughter of the applicant. The applicant is the grandmother of Ann. She was an illegitimate child and was brought up by the grandmother and mother in Liverpool until April, 1957, when the mother went to live with a Mr. L. and took Ann with her. In October, 1957, the mother and L. married, but most unfortunately on Mar. 12, 1958, the mother died. Two days later L. gave notice to the welfare authority that he intended to make application to adopt Ann, and

Ann continued to reside with him. At about the same time the grandmother—and it is quite clear that there is antagonism between the grandmother and L.—decided that the best course for Ann was to have her made a ward of court. She accordingly applied for legal aid to start the necessary motion for that purpose. Meanwhile, L. served his application for an adoption order, and on June 16, 1958, the matter was heard and an adoption order was made in his favour. The result was that the grandmother could not proceed with her application to have the child made a ward of court, and she started these proceedings.

The vital section of the Adoption Act, 1950, for this purpose is s. 2 (2), which reads:

> "An adoption order shall not be made in respect of an infant who is a female in favour of a sole applicant who is a male, unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order."

It is to be observed that the words are very strong. "An adoption order shall not be made unless . . ." and not only must there be special circumstances but the whole proceeding must be treated as an exceptional measure.

By r. 6 of the Adoption of Children (Summary Jurisdiction) Rules, 1949, it is provided that, where an application is made to a court of summary jurisdiction for an adoption order, a guardian ad litem shall be appointed as soon as practicable. In this case that was done, and the local authority became the guardian ad litem. Rule 7 of the rules of 1949 reads:

> "It shall be the duty of the guardian ad litem to investigate as fully as possible all circumstances relevant to the proposed adoption with a view to safeguarding the interests of the infant before the court, and to make a report to the court for that purpose . . ."

That provision is quite general. It is the duty of the guardian ad litem to investigate the circumstances in all cases, but I venture to think that, having regard to s. 2 (2) of the Act of 1950, there is a duty on the guardian to make the most exhaustive investigations and to lay all possible information before the court in such a case, because the court can act only on special circumstances and as an exceptional measure.

To complete the story, a report was put in by a child care officer. The report was dated June 12, 1958, and was signed by the head of the department, and the only reference therein to the grandmother was in these terms:

> "The maternal grandmother seems not always to be clear as to the parentage of the infant, and has on a number of occasions picked up the infant from school and removed her to another part of the country. These happenings occurred whilst the mother of the infant was still alive, and they seem to have rather upset the infant, who is now very frightened of her maternal relations and if she sees them, or thinks she sees them, she runs into the house and hides."

That was the information, and, as far as we know, the sole information, in regard to the grandmother that was given to the justices, whereas in fact, as we now know, the grandmother had been round to see the child care officer on Apr. 9, 1958, and had clearly conveyed the fact that she would like the custody of Ann and that she considered that L. was unsuitable. The child care officer thought that she was aged and confused; that may well be, but at any rate she conveyed that amount of knowledge to him. Further, on Apr. 14, 1958, a telephone call was made to the child care officer. According to the memorandum of the telephone conversation, the call was made by the probation officer, Miss Griffiths,

but apparently there had been some confusion because there was no Miss Griffiths who was a probation officer. The person who spoke on the telephone said that the grandmother had called to see her after seeing a solicitor, and that the solicitor might be advising the grandmother or one of her daughters to apply for a custody order. Therefore, the child care officer clearly knew that there was a grandmother, that the grandmother disapproved of L. and wanted custody of the child, and that the grandmother was consulting a solicitor for the purpose. Not one word of that appeared in the report which was laid before the justices.

By r. 9 of the rules of 1949, as substituted by r. 3 of the Adoption of Children (Summary Jurisdiction) Rules, 1952, it is provided that notice of the hearing of the application for an adoption order shall also be served on

> "(d) any other person, not being the infant, who in the opinion of the court ought to be a respondent to the application . . ."

In those circumstances counsel for the grandmother asks for an order of certiorari. Counsel submitted in the first place, that it was clear that the justices in this case must have overlooked s. 2 (2) of the Act of 1950. He pointed out that, in the statement made pursuant to R.S.C., Ord. 59, r. 3 (2), on the application for leave to apply for an order of certiorari, one of the grounds of the application was:

> "That . . . the justices failed to have due and proper regard to s. 2 (2) of the Adoption Act, 1950, in making the said adoption order."

Despite that, the justices have put in no affidavit, as they are fully entitled to do, explaining that they did consider whether there were special circumstances and what they were. In the absence of any affidavit from the justices to that effect, and having regard to the fact that, in the order which they made, they drew no attention at all to any special circumstances, I think that this court is bound to infer that in this case—and, of course, it is an exceptional case—they omitted altogether to consider the provisions of s. 2 (2) of the Act. As regards the consideration that the justices made no reference to the special circumstances in the order, I should say, in fairness to them, that they followed meticulously the form of order prescribed by r. 16 of the rules of 1949 and set out, as Form 4, in sched. 1 to the rules. The fact, however, remains that there is no suggestion from beginning to end here that the justices ever considered the provisions of s. 2 (2), and there is no reply to the contention raised in the statement giving the grounds for the application for the order of certiorari.

Although it is not necessary to say this, it seems to me that there may well be a second ground on which an order of certiorari will lie in this case, and that is, as it seems to me, that the procedure envisaged in a case of this sort was not followed. I am referring to the procedure whereby the guardian ad litem is to make a full report to the court of the circumstances of the case. I cannot treat the report which was put in as in any sense a full report, bearing in mind that this was a case to which s. 2 (2) applied. It is to be observed that, if a full report had been put in referring to the grandmother's visit to the child care officer and to the subsequent telephone conversation, the justices might well have considered that, pursuant to r. 9 (d), they ought to have the application served on the grandmother.

For those reasons, it seems to me that the justices exceeded their jurisdiction, and an order of certiorari must go. I should add that nothing that I have said should be taken as going in any way to the merits of the case. It may well be that, on a further application and hearing, the justices would be abundantly justified in saying that L. should adopt the child. On the other hand, they may

come to a different conclusion. Nothing that I have said in this case should be taken to pre-judge the issue in any way.

DONOVAN, J.: I agree. It may be, as my Lord has indicated, that there may be special circumstances which would justify an adoption order in this case in favour of Mr. L. Like LORD PARKER, C.J., I say no more about that one way or the other. It is purely a matter for the justices. But, under the express provisions of s. 2 (2) of the Adoption Act, 1950, such an order clearly cannot be made unless the court is satisfied that such special circumstances do exist, justifying such an order as an exceptional measure, and I think that the inference here is overwhelming that this provision was overlooked.

ASHWORTH, J.: I also agree.

Order of certiorari granted.

Solicitors: *Helder, Roberts & Co.*, for *John A. Behn, Twyford & Reece*, Liverpool; *Town Clerk*, Liverpool.

T.R.F.B.

HOUSE OF LORDS

(LORD REID, LORD GODDARD, LORD TUCKER, LORD KEITH OF AVONHOLM AND LORD BIRKETT)

January 19, 22, 1959

DE DEMKO *v.* HOME SECRETARY AND OTHERS

Extradition—Discharge of fugitive—Power of Court of Appeal—Original, not appellate, jurisdiction—Fugitive Offenders Act, 1881 (44 *and* 45 *Vict., c.* 59), *s.* 10.

The appellant, on the refusal of a Divisional Court of the Queen's Bench Division to make an order under the Fugitive Offenders Act, 1881, s. 10, discharging him from custody, appealed to the Court of Appeal who dismissed the appeal on the ground that they had no jurisdiction to entertain the appeal. By s. 10 the power to make the order sought is given to a "superior court", which, by s. 39, means, in England, "Her Majesty's Court of Appeal and High Court."

HELD: the reference to the Court of Appeal in s. 39 confers on that Court original, but not appellate, jurisdiction, and, therefore, the Court of Appeal rightly decided that it had no jurisdiction to entertain the appeal.

APPEAL by Baron Kalman de Demko from an order of the Court of Appeal (LORD EVERSHED, M.R., SELLERS and PEARCE, L.JJ.), reported 122 J.P. 477, dismissing an appeal by the appellant from an order of the Queen's Bench Divisional Court (DEVLIN, DONOVAN and ASHWORTH, JJ.).

The Divisional Court refused to grant the appellant relief under the Fugitive Offenders Act, 1881, s. 10, so that he should not be extradited to South Africa for trial for alleged fraud and theft in or before 1951, and dismissed his application for a writ of habeas corpus. In the Court of Appeal the Crown took the preliminary objection that the Court of Appeal had no jurisdiction to entertain the appeal.

Lawton, Q.C., and *Merriton* for the appellant.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*), *Rodger Winn* and *E. J. P. Cussen* for the Home Secretary and the governor of Brixton Prison.

J. C. Phipps for the High Commissioner for the Union of South Africa.

Their Lordships took time for consideration.

Jan. 22. The following opinions were read.

Eng. Rev

LORD REID: My Lords, the appellant was arrested on Feb. 19, 1958, on charges of fraud and theft alleged to have been committed in the Union of South Africa in or before 1951. He was brought before the chief magistrate at Bow Street

> "as provided by the Fugitive Offenders Act, 1881, to show cause why he should not be returned to the said Dominion in manner provided by the said Act, on the ground of his being accused of the commission of the following offence within the jurisdiction of the said Dominion"

(I quote from the order of the chief magistrate). The offence was described as "Theft: Converting to his own use a loan of £6,500 from" a certain Mrs. Smith. The order made was that the appellant should be kept in custody until delivered pursuant to the provisions of the Fugitive Offenders Act, 1881. The appellant made an application under s. 10 of that Act, and also an application for leave to issue a writ of habeas corpus. These applications were heard by a Divisional Court on July 14, 1958. Section 10 of the Act provides:

> "Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just."

DEVLIN, J., said, in delivering the judgment of the court:

> "The matter has therefore been argued before us on the basis that it would be unjust or oppressive for us to order him to return to stand his trial, and the point has been made that these events and this particular charge occurred seven years ago and that the lapse of time would make it unjust or oppressive that he should now have to go to South Africa to stand his trial. We have heard argument on that on both sides. We have given consideration to the matters which have been raised, and we are not satisfied on the whole that it would be unjust or oppressive to require the accused to stand his trial now on this matter."

The application for a writ of habeas corpus was also refused.

The appellant then appealed to the Court of Appeal, and the Crown took the preliminary objection that the Court of Appeal had no jurisdiction to hear the appeal. The appellant did not maintain that he was entitled to appeal against the refusal to issue a writ of habeas corpus, recognising that *Amand* v. *Secretary of State for Home Affairs* (1) was conclusive authority against the competency of such an application, but he maintained that he was entitled to appeal to the Court of Appeal against the dismissal of his application under s. 10 of the Fugitive Offenders Act, 1881. The Court of Appeal, on Oct. 7, 1958, upheld the Crown's objection to the competency of that appeal, dismissed the appeal with costs, and granted leave to appeal to this House.

Section 31 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides:

> "No appeal shall lie—(a) except as provided by the Criminal Appeal Act, 1907, or this Act, from any judgment of the High Court in any criminal cause or matter."

(1) [1942] 2 All E.R. 381; [1943] A.C. 147.

If there was any jurisdiction in the Court of Appeal with regard to applications under s. 10, it would seem to be saved by s. 26 (2) (d) of the Act of 1925. I must, therefore, look at the earlier position. There was a similar provision in s. 47 of the Supreme Court of Judicature Act, 1873:

> "... no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record ..."

The matter of error of law apparent on the record does not now arise. It is rightly admitted that the appellant's application to the Divisional Court was a criminal cause or matter and, therefore, the appeal to the Court of Appeal could only be competent if there is some statutory provision which excepts applications under s. 10 from the general rule which denies jurisdiction to the Court of Appeal in any appeal relating to a criminal cause or matter.

The appellant argues that such a statutory provision is to be found in the Fugitive Offenders Act, 1881. Section 10 refers to a superior court, and the expression " superior court " is defined in s. 39 as meaning—

> " (1) In England, Her Majesty's Court of Appeal and High Court ...; and
>
> " (2) In Scotland, the High Court of Justiciary; and
>
> " (3) In Ireland, Her Majesty's Court of Appeal and Her Majesty's High Court ... at Dublin; and
>
> " (4) In a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court ... in England, or such court or judge as may be determined by any Act or ordinance of that possession."

No one has yet been able to suggest even a plausible reason why the definition of " superior court " in s. 39 should contain any reference to the Court of Appeal. The Court of Appeal was established by the Supreme Court of Judicature Act, 1873, and its jurisdiction arises entirely from statute. Its function is to exercise appellate jurisdiction in civil cases. It is true that there are one or two matters of comparatively small importance in which it has been given original jurisdiction, and there is at least one matter, criminal in form, in which it has been given appellate jurisdiction because that matter is civil in substance (s. 27 of the Supreme Court of Judicature (Consolidation) Act, 1925). But there appears to be no matter at all comparable to the present in which it has any jurisdiction at all. Applications under s. 10 are often combined with applications for leave to issue a writ of habeas corpus, and it is common ground that the Court of Appeal has no jurisdiction, either original or appellate, to deal with habeas corpus applications. But some meaning must be found for the reference to the Court of Appeal in s. 39; it must be held to confer on that court jurisdiction of some kind, original or appellate, to deal with applications under s. 10. To hold that the Court of Appeal is given original jurisdiction co-ordinate with that of the High Court does not create any great difficulty. It merely produces the somewhat odd result that an applicant under s. 10 can choose whether to make his application to a Divisional Court or to the Court of Appeal. But to hold that this reference to the Court of Appeal confers an appellate jurisdiction would create much more difficulty. In the first place it would entail a breach of the general rule clearly laid down in the Supreme Court of Judicature (Consolidation) Act, 1925, that the Court of Appeal has no appellate jurisdiction in a criminal cause or matter, and, if it was intended that the Court of Appeal should have that jurisdiction, one would have expected the intention to be much more clearly stated. Secondly, it would mean that considerable delays would be made

possible in a matter which otherwise can and should be speedily disposed of. And thirdly, it would mean that there would be a marked difference between the law in England and Ireland on the one hand and the law in Scotland on the other, because it is quite clear that in Scotland there can be no appeal from the first order of the superior court there. Apart from authority, I would, therefore, say without hesitation that this reference to the Court of Appeal in s. 39 of the Fugitive Offenders Act, 1881, must be held to confer on that court original but not appellate jurisdiction.

When I turn to authority I find that this view is confirmed in *R.* v. *Brixton Prison* (*Governor*), *Ex p. Savarkar* (1). The applicant made application to the High Court for a writ of habeas corpus and he also founded on s. 10 of the Fugitive Offenders Act, 1881. Although the court decided against him on both these matters, the order of the court only referred to the habeas corpus application. The Court of Appeal held that they had no jurisdiction to deal with the habeas corpus application, that the matter of s. 10 not being mentioned in the order was not properly before them on the appeal, but that they had original jurisdiction to deal with an application under s. 10 and that this matter was not res judicata because it was not dealt with in the lower court's order. An application was, therefore, made to the Court of Appeal under s. 10. A preliminary objection to its competency was not upheld, and the application was heard and dismissed.

Counsel for the appellant argued that *Savarkar's* case (1) was wrongly decided and he founded on a passage in the judgment of BUCKLEY, L.J.:

> "There is one other point upon which I wish to say a word. It is this: it would be another possible objection to the original motion which, as the result of this judgment, we are going to hear that, where the Act of 1881 refers to the 'Court of Appeal' as a 'superior court', it means that court sitting as a Court of Appeal. The learned Solicitor-General has not thought fit to argue that point. I agree with what VAUGHAN WILLIAMS, L.J., has said to the effect that we must for ourselves determine that point in order to hear this motion. As my two brothers think that that point is to be resolved in favour of our hearing the motion, of course that decides the matter. For my own part, I have not heard the matter argued, and will only say that I think it a question of very considerable difficulty whether, when this Act speaks of the 'Court of Appeal', it does not mean the Court of Appeal sitting as a Court of Appeal. It is unnecessary for me to say more as to this point, because the other members of the court do not think that is the meaning."

I do not think that it is necessary to make further citations from this case. For my part, I can only say that I think that the case was rightly decided, and in subsequent cases it has been accepted without question. In *Re Henderson*, *Henderson* v. *Secretary of State for Home Affairs* (2), an application under s. 10 to the Court of Appeal was dealt with without any question being raised as to the competency, and in *Amand's* case (3) reference was made to *Savarkar's* case (1) by both VISCOUNT SIMON, L.C., and LORD WRIGHT. It is true that *Amand's* case (3) does not raise the precise point here, but it is obvious that *Savarkar's* case (1) was considered with some care. VISCOUNT SIMON, L.C., said:

> "As regards the right to appeal, it has been consistently held that there is no right of appeal from the refusal of the writ in extradition proceedings:

(1) [1910] 2 K.B. 1056.
(2) [1950] 1 All E.R. 283.
(3) [1942] 2 All E.R. 381; [1943] A.C. 147.

Ex p. Woodhall (1); or in proceedings under the Fugitive Offenders Act, 1881: *R.* v. *Brixton Prison (Governor), Ex p. Savarkar* (2). It will be observed that these decisions, which I accept as correct, involve the view that the matter in respect of which the accused is in custody may be 'criminal' although he is not charged with a breach of our own criminal law . . ."

LORD WRIGHT twice referred to *Ex p. Savarkar* (2) without any indication of doubt on his part that the case had been well decided.

I am, therefore, of opinion that the Court of Appeal reached a correct result in this case, and I move your Lordships to dismiss this appeal with costs.

LORD GODDARD: My Lords, I concur.

LORD TUCKER: My Lords, I agree.

LORD KEITH OF AVONHOLM: My Lords, I agree.

LORD BIRKETT: My Lords, I agree.

Appeal dismissed.

Solicitors: *Beach & Beach* ; *Director of Public Prosecutions*; *Jaques & Co.*

G.F.L.B.

(1) (1888), 52 J.P. 581; 20 Q.B.D. 832.
(2) [1910] 2 K.B. 1056.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND ASHWORTH, JJ.)

January 20, 28, 1959

WINTER *v.* HINCKLEY & DISTRICT CO-OPERATIVE SOCIETY, LTD.

Weights and Measures—Coal—Exposing for sale sacks with deficiency in weight—Weight correct when sacks left employers' premises—Subsequent theft by servant—Servant brought before court as "actual offender"—Mens rea—Weights and Measures Act, 1889 (52 *and* 53 *Vict., c.* 21), *s.* 29 (2)—*Sale of Food* (*Weights and Measures*) *Act*, 1926 (16 *and* 17 *Geo.* 5, *c.* 8), *s.* 12 (5).

The defendant company exposed for sale on a coal lorry 39 sacks of coal, each of which was marked "112 lbs. coal". The lorry was stopped by an inspector of weights and measures and 33 of the sacks were found to contain short weight. In each case the weight had been correct when the lorry left the company's premises, and the deficiencies had been caused by theft by C., the company's servant, who was in charge of the vehicle. Informations were preferred by the inspector against the defendant company, charging them with exposing for sale sacks of coal which were of less weight than that represented by the sellers, contrary to s. 29 (2) of the Weights and Measures Act, 1889. The defendant company gave notice under s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, and preferred informations against C., alleging that they had used due diligence to enforce the execution of the Act, that C. had committed the offence without their consent, connivance or wilful default, and that C. was the actual offender. The justices dismissed the informations on the grounds that the defendant company did not know that the representations with regard to weight were false and that the exposing for the sale was the act of C., and not that of the defendant company, C. having acted outside the scope of his employment. On appeal by the prosecutor,

HELD: that the exposure for sale was the act of the defendant company and not an independent act by C.; that no mens rea was necessary to constitute an offence under s. 29 (2) of the Act of 1889; and that, therefore, the case must be remitted to the justices with a direction to convict.

Roberts v. *Woodward*, (1890), 55 J.P. 116, distinguished.

Twentyman v. *John Hulbert, Ltd.*, (1944), 108 J.P. 168 overruled.

CASE STATED by Leicestershire justices.

Informations were preferred at Market Bosworth magistrates' court by the appellant Winter, an inspector of weights and measures for the county of Leicester, charging the respondents, Hinckley and District Co-operative Society, Ltd., with exposing for sale sacks of coal which were of less weight than that represented by the sellers, contrary to s. 29 (2) of the Weights and Measures Act, 1889. On May 1, 1958, the respondents sent out sacks of coal on a lorry for sale in the street to whomsoever might want to buy it. The appellant stopped the lorry. There were then 39 sacks of coal on it. Each sack was labelled " 112 lbs. coal." When weighed by the appellant 33 of the sacks were found to contain less than 112 lbs. of coal. The deficiency varied between 11 and 22 lbs. per sack. When the sacks left the respondents' premises they each contained 112 lbs. of coal, but an employee maned Cooper, who was in charge of the vehicle, thereafter stole coal from the sacks and thus produced the deficiencies in weight found by the appellant. The respondents, after being served with informations, availed themselves of s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926), and preferred informations against Cooper, alleging that they (the respondents) had used due diligence to enforce the execution of the Act, that Cooper had committed the offence without their consent, connivance, or wilful default, and that he was the actual offender. All the informations were heard together by the justices, who dismissed them. The prosecutor appealed.

J. G. Jones for the appellant.

H. A. Skinner for the respondents.

Cur. adv. vult.

Jan. 28. **DONOVAN, J.,** read this judgment of the court. The facts in summary are these. The respondents sell coal, among other things. On May 1, 1958, they sent out a lorry with sacks of coal on it for sale in the street to whomsoever might want to buy it. The appellant, a weights and measures inspector, stopped the lorry. There were then thirty-nine sacks of coal on it. Each sack was labelled " 112 lb. coal ". When weighed by the inspector thirty-three of the sacks were found to contain less than 112 lb. of coal. The deficiency varied between eleven and twenty-two lb. per sack.

When the sacks left the respondents' premises, they each contained 112 lb. of coal, but an employee named Cooper, who was in charge of the vehicle, thereafter stole coal from the sacks and thus produced the deficiencies in weight found by the inspector. The respondents, after being served with informations, availed themselves of s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, and preferred informations against Cooper alleging that the respondents had used diligence to enforce the execution of the said Act and that Cooper had committed the offence without the respondents' consent, connivance or wilful default; and that he was the actual offender. All the informations were heard together by the magistrates, and after hearing legal arguments they dismissed them all. In doing so they said that in their view the contentions put forward by counsel for the respondents were correct. Those contentions were these: (a) that there was no evidence to prove that the respondents knew that the representation as to weight was false, or could reasonably have found out that the coal was short weight; (b) since the respondent in *Twentyman* v. *John Hulbert, Ltd.* (1) was held not criminally liable for " tampering " by his servant, a fortiori the respondents were not liable for the larceny of their servant in this case; (c) since the act of stealing by Cooper was outside the scope of his employment

(1) (1944), 108 J.P. 168; 170 L.T. 340.

and done in fraud of the respondents, the act of exposing for sale was an independent act by Cooper outside the course and scope of his employment for which the respondents were not criminally liable. In answer to these contentions the present appellant argued before the magistrates that the offences charged under s. 29 (2) were absolute, that proof of mens rea was not necessary, and that the act of Cooper in exposing for sale sacks which were deficient in weight was sufficient to render the respondents guilty of the alleged offences.

In support of his contentions the solicitor for the present appellant quoted *Brentnall & Cleland, Ltd.* v. *London County Council* (1). On this the magistrates say that, the solicitor not having a report of that decision with him, they were not referred to any specific passages in the judgments. One can perhaps sympathise with the magistrates in this respect because the decision in *Brentnall & Cleland, Ltd.* v. *London County Council* (1) clearly lays down that mens rea is not a necessary ingredient of this offence, and HUMPHREYS, J. (whose remarks in the *Twentyman* case (2) were relied on by counsel for the respondents) specifically disowned their accuracy and rather doubted whether he had been correctly reported.

Now that the Case Stated is before us, counsel for the respondents admits that the offence created by s. 29 (2) is absolute, and that mens rea is not a necessary ingredient of the offence. He also admits that the representation constituted by the respondents' label on each of their sacks, namely, " 112 lb. of coal " was a representation by the respondents. But he says that in the circumstances the respondents did not " expose the coal for sale ". This, he still alleges, is an independent act done by Cooper outside the scope of his employment, and therefore that the respondents are not in breach of s. 29 (2).

We have some difficulty in understanding this argument. Before Cooper committed the theft of a few pounds of coal from some of the sacks, the 112 lb. of coal in each of those sacks was admittedly being exposed for sale by the respondents; and what is true of the whole contents of the sacks seems to us to be true of each part. When, therefore, the contents of the sacks are reduced to ninety odd lb., each of those sacks is still being exposed for sale by the respondents. The reduced contents were, in our view, unaffected in this respect by Cooper's pilfering. Different considerations would arise if Cooper had substituted different coal not belonging to the respondents, but such is not the case. It was the respondents' coal which was still being sold in their sacks by the man authorised to sell it, and in these circumstances we think the respondents were clearly exposing it for sale.

That is enough to dispose of this case; but a word should perhaps be said about the authorities quoted to us. In *Roberts* v. *Woodward* (3) it was held that there must be a representation by the seller of the weight of coal sold. The facts of the case were that a greengrocer who also sold coal received orders for five cwt. of coal, and the five sacks containing this coal when weighed by the inspector en route to the customer were found to be deficient in weight. But the seller had made no representation to anyone as to the weight of the coal. All that had happened was that when his servant was stopped en route by the inspector, and was asked what weight the sacks contained, the servant told him one cwt. each which was found to be wrong. On these rather special facts the court held that the seller had made no representations as to weight and was not criminally responsible for the representation made by his servant.

(1) 109 J.P. 34; [1944] 2 All E.R. 552; [1945] K.B. 115.
(2) (1944), 108 J.P. 168; 170 L.T. 340.
(3) (1890), 55 J.P. 116; 25 Q.B.D. 412.

It is to be noted that the case was decided in 1890, i.e., one year after the Act was passed; but in any event the decision does not touch the present case where admittedly there was a representation by the respondents. It may also be useful to recall that POLLOCK, B., said among other things:

> "In the present case there was no verbal representation by the seller as to the weight of the coals, as there usually would be in cases where the coals were sold in the shop or were hawked round the streets for sale . . ."

In *Twentyman* v. *John Hulbert, Ltd.* (1) the report in the LAW TIMES gives the ratio decidendi of the judgment to be that evidence must be forthcoming that the seller knew that the representation as to weight was false; in other words that there must be mens rea. No other ground for the decision is suggested in that report. As it stands, therefore, the decision cannot be treated as of continuing authority.

Brentnall & Cleland, Ltd. v. *London County Council* (2) lays down specifically that mens rea is not a necessary ingredient for an offence under s. 29 (2); and the following passage in the judgment of VISCOUNT CALDECOTE, C.J., is in point:

> ". . . I think that the court of quarter sessions came to a perfectly correct decision when they said that in their opinion mens rea was not a necessary element in the offence . . . If an offence is shown to have been committed under s. 29, I think it is sufficient to show that there was a representation —which of course is clearly proved in this case—and that, as the coal which was being carried was deficient in weight, whether or not Messrs. Brentnall & Cleland, Ltd., the appellants, themselves were aware of the fact seems to me to have been an unnecessary matter for consideration."

What happened in the present case was that there was an exposing for sale by the respondents of coal which was represented as being 112 lb. in weight but which was in fact less; that the respondents were saddled with such representation and deficiency by the dishonest act of their employee Cooper. This gives the respondents no defence under s. 29 (2); but since Cooper, the real offender, was not made a party to the present appeal, no penalty can now be visited on him. In the circumstances the magistrates might think it right on this occasion to grant the respondents an absolute discharge, though this is a matter for them to decide. The appeal must be allowed and the case go back to the justices with a direction to convict these respondents.

Appeal allowed.

Solicitors: *Kingsford, Dorman & Co.*, for *John A. Chatterton*, Leicester; *Thomas Flavell & Sons*, Hinckley.

T.R.F.B.

(1) (1944), 108 J.P. 168; 170 L.T. 340.
(2) 109 J.P. 34; [1944] 2 All E.R. 552; [1945] K.B. 115.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., DONOVAN AND ASHWORTH, JJ.)

January 28, 1959

R. *v.* JONES

Criminal Law—Capital murder—"Murder done in course of theft"—Theft already completed—Murder by burglar to effect escape—Homicide Act, 1957 (5 *and* 6 *Eliz.* 2, c. 11), *s.* 5 (1).

Where a thief or burglar has already completed the theft but kills a person in order to effect escape and avoid detection, the murder is murder "done in the course . . . of theft" within the meaning of s. 5 (1) of the Homicide Act, 1957, and accordingly capital murder.

APPEAL against conviction.

The appellant was convicted at Leeds Assizes before Hinchcliffe, J., of capital murder and was sentenced to death. At about 9 p.m. on September 30, 1958, the appellant broke into a co-operative society shop. He went upstairs, where he knew there was a safe. To his surprise he found the safe open. He took silver and notes amounting to about £70 out of the safe and put it into his pockets. As he was about to descend the stairs, he heard the click of the front door and saw the lights go on. Mr. Turner, the manager of the store, had come back to lock up and shut the safe which he had left open. As Mr. Turner neared the top of the stairs the appellant struck him a fatal blow.

Gillis, Q.C., and *L. H. Scott* for the appellant.

Veale, Q.C., and *R. Withers Payne* for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant was convicted at Leeds Assizes of capital murder and he now appeals against his conviction. The facts are in a very short compass. On Sept. 30, 1958, at about 9 p.m. he broke into a co-operative society's stores near Huddersfield. He collected downstairs some cigarettes which he put into a carton ready to take away from the premises. He then went upstairs where, as the result of a previous successful burglary, he knew that there was a safe. To his surprise he found that the safe was open. He took silver and notes amounting to about £70 out of the safe and put all or most of it into his pocket. He was about to descend the stairs when he heard a click of the front door and the lights downstairs went on. He took refuge behind some sacks of flour. The man who had come into the premises was Mr. Turner, the manager of the stores, and he came up the stairs in order to shut up and to close the safe. When he was near the top of the stairs, he received a blow from the appellant as a result of which he died, and it was found that his skull was fractured in five places. The appellant's first defence was based on an alibi, but that was not pursued. At the trial his case was that he had merely pushed the manager, who must have struck his head and fractured his skull in falling; that he had no intention of doing grievous bodily harm to the manager, let alone committing murder; and, finally, that, even if it were held that his acts constituted murder, yet it was not "murder done in the course or furtherance of theft", within s. 5 (1) (a) of the Homicide Act, 1957, so as to constitute capital murder within the meaning of the Act.

As regards the defence that the appellant had no intention to inflict grievous bodily harm or murder, it is enough to say that no complaint is made whatsoever of the very careful directions given by the learned judge both on the law and on the facts. It is sufficient to say that there was ample evidence on which the jury could come to the conclusion that this was murder and not manslaughter. The real point taken on this appeal concerns the question whether the murder

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was committed "in the course or furtherance of theft" so as to constitute capital murder. It is said that, if the appellant were to be believed, the theft was complete. His case was that, having found the safe open, he thought that someone had been there recently, that he took fright, that he took what money he could immediately lay his hands on and decided then and there to leave the premises without looking round for anything else to take and without even collecting the cigarettes which he had put aside. In other words, his case was that he took fright and that, quite apart from the clicking of the front door, he had determined to go. It is said that that defence was never adequately put to the jury. In the view of this court the defence was adequately put, even though it was not put in very great detail. The matter, however, does not end there, because, even if this was a case in which the defence had not been properly put, it does not seem to this court that the argument is sound that, if a man has committed a theft the offence is complete for all purposes, so that, if thereafter, in an attempt to avoid detection he strikes somebody and commits murder, it is not capital murder. This was a case where the appellant was caught, if one may use the expression, red-handed, and in order to avoid detection, and while still on the scene of his theft, he committed murder. It is difficult to see why that should not be within the words "in the course . . . of theft".

The court was referred to *H.M. Advocate* v. *Graham* (1), a decision in the High Court of Justiciary in Scotland, and to the summing-up in the case by LORD SORN. The facts do not matter, but in the course of summing-up LORD SORN said this:

> "Now you have just heard it suggested to me by counsel for the defence that murder is only done in the course of theft if the man did it in order to get on with the theft after he had done the murder. I think that was the suggestion. I have only got to tell you that I do not agree with that. It is a question of what is meant by the course of a theft, and I think that the course of a theft is begun when perpetration is begun; that is to say that it covers the period of attempt as well as the period of completion; the attempt of the crime as well as the crime; and I say that if a burglar is interrupted in that course, the course of perpetration, and if he murders even in order to get away, not with the idea of going on, but with the idea of getting away, it still is murder done in course of theft. It would be, I think, somewhat ridiculous to suppose that Parliament has said 'We will make it capital murder if the householder wakes up and goes to interfere with a burglar and gets killed by a burglar who kills him in order to go on with his stealing, but we won't make it capital murder if the burglar murders him in order to run away'. I think it does not matter what he was going to do afterwards; or what he did afterwards; if he was in the course of theft and he did the killing, it is 'in course of' within the meaning of s. 5 of the Homicide Act; and I so direct you in law."

In the view of this court, that summing-up of LORD SORN was perfectly correct and the court agrees with what LORD SORN there said. The court would only add that for the purposes of this case it has been necessary to consider only the words "in the course . . . of theft" and not the further words "or furtherance of theft"; the consideration of the whole of those words together remains for another occasion. In these circumstances, the court is clearly of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

T.R.F.B.

(1) [1958] Sc. L.T. 167.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND ASHWORTH, JJ.)

January 19, 1959

R. *v.* HUNTINGDON JUSTICES. *Ex parte* SIMPKIN AND COOMBES

Magistrates—Committal to quarter sessions for sentence—Entry in register—Date of offence omitted—Wrong statute stated—Order that entry be quashed—Duty of clerk to magistrates to make new entry and transmit to quarter sessions—Magistrates' Courts Act, 1952 (15 *and* 16 *Geo.* 6 *and* 1 *Eliz.* 2, *c.* 55), *s.* 29—*Magistrates' Courts Rules*, 1952 (*S.I.* 1952, *No.* 2190), *r.* 54.

The applicants were charged at a magistrates' court on two informations, the first of which alleged the larceny and the second the receiving of a lorry spare wheel and tyre. The justices dismissed the first information, but convicted on the second, and committed the applicants to quarter sessions for sentence under s. 29 of the Magistrates' Courts Act, 1952. The entry in the register, which under r. 54 of the Magistrates' Courts Rules, 1952, it was the duty of the clerk to the justices to make, was correct in respect of the adjudication on the information for larceny, but on the information for receiving, in column five of Form 117 (the appropriate form) which provided for the dates, the word "ditto" was entered, and in column 4 under "Nature of offence" the words entered were "received from some persons unknown a Bedford spare lorry wheel complete with tyre" of a certain size "knowing the same to have been stolen". The minute of adjudication was: "Committed to quarter sessions for sentence in accordance with s. 29 of the Criminal Justice Act, 1948". The clerk of the justices sent to the clerk of peace, under r. 20 of the rules of 1952, a copy of both adjudications, the acquittal and the conviction, and the latter contained the aforementioned inaccuracies and omissions. On motion on behalf of the applicants to bring up and quash the record of the conviction on the ground that the record did not comply with r. 54,

HELD: (i) that, without deciding whether the nature of the offence had been sufficiently fully set out in the register, the entry in the register failed to comply with r. 54 because the date of the offence had not been set out and the wrong statute had been cited, and, therefore, the entry must be quashed and the copy which was sent forward to quarter sessions amounted to a nullity; (ii) that it became the duty of the clerk of the justices, having struck out the original entry, to make a new and proper entry and to forward a copy of that entry to quarter sessions, who would then be in a position to adjudicate, but it was not necessary that there should be any order of mandamus directing the clerk to do this, as he could act in pursuance of his statutory duty.

MOTION for order of certiorari.

The applicants, John Simpkin and Charles Eton Coombes, were charged on two informations, the first of which alleged the larceny of a lorry spare wheel and tyre, and the second the receiving of the wheel and tyre. The informations were heard at Huntingdon magistrates' court on July 20, 1958, when the justices dismissed the first information and convicted on the second. The justices ordered that the applicants be committed to Huntingdonshire Quarter Sessions for sentence. The entry in the register, which under r. 54 of the Magistrates' Courts Rules, 1952, it was the duty of the clerk of the justices to make, was correct in respect of the adjudication on the information for larceny, but on the information for receiving, in column five of Form 117 provided for the date, the word "ditto" was entered; under "Nature of offence" were the words "Received from some persons unknown a Bedford lorry spare wheel complete with tyre" of a certain size, "knowing the same to have been stolen"; and the minute of adjudication was "Committed to quarter sessions for sentence in accordance with s. 29 of the Criminal Justice Act, 1948". By r. 20 of the rules the clerk to the justices is required to send to the clerk of the peace a copy signed by the clerk of the justices' court of the minute or memorandum of the

conviction entered in the register. In the present case he sent forward a copy of both adjudications, the acquittal and the conviction. Application was made on behalf of the applicants for an order of certiorari to bring up and quash the record of the conviction on the ground that the record did not comply with r. 54, and leave to apply for such order was granted.

J. Yahuda for the applicants.
W. H. Hughes for the respondents.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of the two applicants, John Simpkin and Charles Eton Coombes, for an order of certiorari to bring up and quash the record of a conviction of the applicants on July 20, 1958 by the magistrates' court for Huntingdon and Leightonstone district.

The applicants were charged, first, with stealing a Bedford lorry spare wheel complete with tyre off a lorry which was parked at Mac's Cafe on the Great North Road, Upton, Huntingdon, and, by way of alternative charge, with receiving a Bedford lorry spare wheel. I should mention that at one stage complaint was made with regard to the form of the charge for receiving on the ground it did not set out the date when the receiving was alleged to have taken place or whose property the spare tyre was alleged to be. Quite clearly, it was intended to relate to the Bedford lorry spare wheel which was the subject of the first charge for stealing, but counsel properly abandoned any complaint on that ground because he himself had agreed to the alternative charge being considered and knew fully the charge which his clients had to meet and there could have been no embarrassment whatsoever.

In due course the justices convicted, and ordered that the two applicants should be committed to quarter sessions for sentence. So far the matter is clear, and counsel has not sought to challenge the actual conviction or the order made committing the applicants to quarter sessions for sentence. It then became the duty of the clerk to the justices to make an entry in the register which was in his charge. The relevant provisions of r. 54 of the Magistrates' Courts Rules, 1952, are in these terms:

> "1. The clerk of every magistrates' court shall keep a register in which there shall be entered—(a) a minute or memorandum of every adjudication of the court . . ."

Paragraph 2 (2) provides that it is to be in the prescribed form. By (3):

> "The entry in the column of the register headed 'Nature of Offence' shall show clearly, in case of conviction or dismissal, what is the offence of which the accused is convicted or, as the case may be, what is the offence charged in the information that is dismissed."

The prescribed form, which is Form 117, provides in column 4 for the nature of the offence or matter of complaint and in column 5 for the date of offence or matter of complaint. Purporting to comply with those provisions, the clerk made an entry in the register, which set out perfectly properly the two adjudications. The first one, that in respect of stealing, was first entered. The article concerned was described as a Bedford lorry spare wheel of a certain size, the property of the Midland Motor Company, and the date of the offence was stated as between July 16 and 17, 1958. Then there was an entry that the prisoners elected to be tried summarily and pleaded Not Guilty, and the minute of adjudication is stated to be "Dismissed". There followed what purported to be the entry of adjudication in respect of the receiving, and one sympathises with the

clerk in that he adopted a sort of shorthand as regards the next entry. He entered, first of all, the name of the informant or complainant "ditto". He set out the names of the two defendants. Then he said under "Nature of Offence": "Received from some person unknown a Bedford lorry spare wheel complete with tyre" of a certain size "knowing the same to have been stolen", and in the column for "Date", he put "Ditto". The minute of adjudication was: "Committed to quarter sessions for sentence in accordance with section 29", and then unfortunately the words "of the Criminal Justice Act, 1948", appear whereas they should have been s. 29 of the Magistrates' Courts Act, 1952. Pausing there, in my judgment, that second entry, namely, the adjudication in respect of the receiving charge does not strictly comply with r. 54 of the rules.

In my judgment, it is imperative that convictions should be fully and accurately recorded, and this was not. In particular there was no specific entry of the date of the offence. It was also suggested that the nature of the offence was not properly described in that it did not state where the receiving had taken place or whose property the spare wheel was. I find it unnecessary to say whether those two matters should or should not have been entered, but there is no doubt that r. 54 (3) does provide that a description of the offence should be set out, and clearly that must be with sufficient detail so that it can be seen exactly in respect of what charge the prisoners were convicted. At any rate, in regard to the date of offence this record is not complete and not in accordance with the rules. The effect of that not being in order was this. It is provided by r. 20 that in sending the case forward to quarter sessions, the clerk of the justices shall send to the clerk of the peace a copy signed by the clerk of the justices' court of the minute or memorandum of the conviction entered in the register. What went forward to quarter sessions in the present case was a copy of the two adjudications in the register. If the clerk had sent forward the second adjudication, which was the one of conviction, it was clearly incomplete because it had no date, and in order that he should make it complete he had to send what I may call an omnibus copy, namely, a copy of both adjudications, the acquittal and the conviction. He also in that copy perpetuated the error which had already crept in of a committal under s. 29 of the Criminal Justice Act, 1948.

The question, therefore, is what should be done in the premises? Counsel agrees that the conviction itself and the committal were good at the time when they were made, but he says that the entry in the register should be quashed and that is an end of the matter; in other words, the conviction may be good, but the record of it must be destroyed and, I suppose, these applicants go without any sentence whatsoever. In my judgment, there is an error here in the record. Whether one looks upon the record as incomplete or inaccurate I think matters not for this purpose, but it is of such a nature that the entry must be quashed, and of course if that entry is quashed the copy of it which went forward to quarter sessions falls to the ground and in a complete nullity. The effect of that is this, that a conviction exists with an order by the justices to commit to quarter sessions, and the record having been quashed, there is then no entry in the record. In my judgment, it then becomes the duty of the clerk under r. 54, to which I have referred, having as it were struck out the original entry, to make a new entry. It is suggested that he has no power to do that. In my judgment, he not only has power, but it is his duty to do that. Nor, in my judgment, is it necessary that there should be any order of mandamus on him to do so. He can by reason of his statutory duty be trusted to do what is right, and, having completed the record and made a proper entry in the register, he then can and should send forward to quarter sessions a copy of that new entry, and no doubt in doing so will take the precaution of seeing that the committal is under s. 29

of the Magistrates' Courts Act, 1952. In my judgment, therefore, the only order called for in this case is that the entry of adjudication in respect of the receiving charge should be quashed.

DONOVAN, J.: I agree. This case illustrates the difficulties which can arise through entries in the court's register being abbreviated in order to save an insignificant amount of time, and the clerk to the justices will, no doubt, be on guard to avoid any similar trouble in the future

ASHWORTH, J.: I agree.

Order accordingly.

Solicitors: *Edward Davis, Nelson & Co.; Peacock & Goddard, for Hunnybun & Sons,* Huntingdon.

T.R.F.B.

HOUSE OF LORDS

(LORD MORTON OF HENRYTON, LORD TUCKER, LORD COHEN, LORD KEITH OF AVONHOLM AND LORD SOMERVELL OF HARROW)

December 8, 9, 10, 1958, January 28, 1959

GENERAL NURSING COUNCIL FOR ENGLAND AND WALES *v.* ST. MARYLEBONE CORPORATION

Rates—Relief—"Organisation concerned with advancement of social welfare"—General Nursing Council for England and Wales—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *and* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

The General Nursing Council for England and Wales, originally formed under the repealed Nurses Registration Act, 1919, existed under and for the objects declared in the Nurses Act, 1957. The functions of the council included the maintenance of a register of nurses, together with a roll of assistant nurses; the regulation of the conditions of admission to and removal from the register and the roll, and, in connexion therewith, the exercising of supervisory and directing powers in regard to training and examination; and the exercising of other ancillary powers. The Act of 1957 also provided penalties for the false assumption of the title of registered or enrolled nurse, and imposed restrictions on the use of the titles of nurse or assistant nurse.

HELD: the council was not an organisation whose main objects were "concerned with the advancement of . . . social welfare" within s. 8 (1) (a) of the Act of 1955, because (i) the main object of the council, viz., to regulate the profession of nursing in the manner and to the extent set out in the Nurses Act, 1957, was not charitable; and (ii) (LORD COHEN and LORD SOMERVELL OF HARROW dissenting) public benefit was not the test of social welfare, though social welfare might be public benefit, and, however wide a meaning was given to "social welfare" or to "the advancement of social welfare", the objects and functions of the council were not concerned with either.

Decision of the Court of Appeal (1957), 122 J.P. 67 affirmed.

APPEAL by the ratepayers, the General Nursing Council for England and Wales, from a decision of the Court of Appeal (LORD EVERSHED, M.R., ROMER and ORMEROD, L.JJ.), reported 122 J.P. 67, that the appellant council was not an organisation concerned with the advancement of social welfare so was not entitled to relief from rating under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Squibb, Q.C., and *Roots* for the ratepayers.

Cross, Q.C., and *E. Blanshard Stamp* for the rating authority.

Their Lordships took time for consideration.

Jan. 28. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, I shall hereafter refer to the appellants as " the council ". The only issue on this appeal is whether the council is entitled to partial relief from rates pursuant to s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. I shall refer to that Act as " the Rating Act of 1955 ". The material part of s. 8 is as follows:

" Provisions as to rates payable by charitable and other organisations.—(1) This section applies to the following hereditaments, that is to say—

" (a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare;

" (b) any hereditament held upon trust for use as an almshouse;

" (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field:

" Provided that this section shall not apply to any hereditament to which s. 7 of this Act applies, or to any hereditament occupied by an authority having, within the meaning of the Local Loans Act, 1875, power to levy a rate."

The remaining sub-sections grant certain reductions in the rates chargeable in respect of any hereditament to which the section applies.

The council is a body corporate established by the Nurses Registration Act, 1919, and now has the powers and duties conferred and imposed on it by the provisions of the Nurses Act, 1957, which consolidates the Act of 1919 and certain subsequent Acts. It is common ground between the parties that the powers and duties of the council under the Act of 1957 do not differ in any material respect from its powers and duties at the time when the Rating Act of 1955 became law. It is also common ground between the parties that the council is " an organisation which is not established or conducted for profit ", but it has to be determined, on this appeal, whether its " main objects " are such as to bring it within s. 8 (1) (a) of the Rating Act of 1955. The council is, and was at all material times, the rateable occupier of premises known as Nos. 17 and 23-25, Portland Place, in the Metropolitan Borough of St. Marylebone. These premises are occupied for the purposes of the council. The respondents, who are the rating authority for that borough, refused to recognise the council as an organisation such as is mentioned in s. 8 (1) (a) of the Act. DANCKWERTS, J., granted the council a declaration that it is such an organisation, but his decision was reversed by the Court of Appeal.

Having regard to the decision of the Court of Appeal in *General Medical Council* v. *Inland Revenue Comrs.* (1), and to the decision of the Court of Session in *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2), it was not contended before DANCKWERTS, J., and the Court of Appeal that the council can be regarded as an organisation whose main objects are charitable, and the judgments of DANCKWERTS, J., and the Court of Appeal were solely concerned

(1) (1928), 97 L.J.K.B. 578; 139 L.T. 225.
(2) 1929 S.C. 664.

with the question whether the main objects of the council are "otherwise concerned with the advancement of . . . social welfare". In this House, it was contended on behalf of the council that its main objects are charitable or, in the alternative, are otherwise concerned with the advancement of social welfare.

My Lords, it is thus apparent that, in order to decide the issue between the parties, it is necessary to decide the following questions:—(i) What are the "main objects" of the council within the meaning of s. 8 (1) (a) of the Rating Act of 1955? (ii) Are these main objects charitable? (iii) If not, are these main objects "otherwise concerned with the advancement of social welfare"? It is, of course, possible that the council has only one main object, but, if it has more than one, it will not be an organisation within s. 8 (1) (a) unless all its main objects come within that paragraph.

In order to answer the questions just stated, it is necessary to consider the provisions of the Nurses Act, 1957, in some detail, since, in accordance with modern custom, there is no preamble to the Act, and the objects of the council can only be ascertained by a study of these provisions. I must, therefore, refer to them in some detail. Section 1 (1) of the Act is as follows:

> "The body established by s. 1 of the Nurses Registration Act, 1919, by the name of the General Nursing Council for England and Wales shall continue in existence by that name and shall have such powers and duties as are conferred and imposed on them by the following provisions of this Act."

Section 1 (2) and Sch. 1 state what the constitution of the council is to be. Section 2 is as follows:

> "(1) It shall be the duty of the council—(a) to maintain, in accordance with rules in that behalf made by them, the register of nurses established in pursuance of the Nurses Registration Act, 1919, which shall consist of—(i) a general part containing the names of all nurses who satisfy the conditions of admission thereto; (ii) a part containing the names of nurses trained in the nursing and care of persons suffering from mental diseases; (iii) a part containing the names of nurses trained in the nursing of sick children; and (iv) such other parts as may be prescribed; (b) to maintain, in accordance with rules in that behalf made by them, the roll of assistant nurses established in pursuance of Part 1 of the Nurses Act, 1943.
>
> "(2) Where a person satisfies the conditions of admission to a part of the register other than the general part, his name may be included in that other part notwithstanding that it is also included in the general part.
>
> "(3) A certificate under the seal of the council duly authenticated stating that a person is, or was at any date, or is not, or was not at any date, duly registered or enrolled shall be evidence in all courts of law of the fact stated in the certificate."

Under s. 3 (1), the council is to

> ". . . make rules for regulating the conditions of admission to the register and to the roll respectively and the conduct of any examinations which may be prescribed as a condition of admission thereto and any matters ancillary to or connected with any such examinations, and any such rules shall contain provisions—
>
> "(a) requiring, as a condition of the admission of any person to the register or the roll, that that person shall have undergone the prescribed training, and shall possess the prescribed experience, in nursing; and
>
> "(b) requiring that the prescribed training shall be carried out either in an institution approved by the council in that behalf or in the service of the Admiralty, the Army Council or the Air Council."

The section also provides for the payment to the council, in respect of applications for examination, registration or enrolment, of such fees as the council may, with the approval of the Minister of Health, from time to time determine. In s. 4 there is provision for the registration of nurses trained abroad, and in s. 5 there is provision for a list of persons neither registered nor enrolled, who completed a course of nursing in a satisfactory institution before July 1, 1925. Section 6 deals with the admission to the register of certain persons there specified. Section 7 provides for the council making rules concerning removal from, and restoration to, the register, roll and list. Under s. 10:

> "The council shall make rules providing for the issue of certificates to persons registered or enrolled and with respect to the uniform or badge which may be worn by persons registered and persons enrolled respectively."

Section 11 to s. 16 inclusive deal with the training of nurses. It is, I think, sufficient to set out s. 11 (1) to (3):

> "(1) The Minister shall by order constitute, in accordance with Sch. 2 to this Act, a committee (in this Act referred to as an 'area nurse-training committee') for each hospital area; and before making an order under this sub-section with respect to any such area the Minister shall consult with the council.
>
> "(2) It shall be the duty of the area nurse-training committee for a hospital area—
>
> "(a) to have constant regard, as respects persons engaged in the area in the training of nurses, to the methods employed by those persons of training nurses;
>
> "(b) to promote, with a view to securing the improvement of methods employed in the area of training nurses, research and investigation into matters relating to the training of nurses, and to render to the council reports of the results of research and investigation promoted by the committee;
>
> "(c) to advise and assist—(i) hospital management committees appointed by the regional hospital board for the area; (ii) boards of governors of teaching hospitals situated in the area; and (iii) any other authority or person engaged in the area in the training of nurses who makes a request in that behalf to the committee; in the preparation and carrying out of schemes for the training of nurses in accordance with any requirements of the council for the time being in force with respect to the training to be undergone by persons as a condition of their admission to the register or the roll; and
>
> "(d) to advise and, if requested by the council so to do, to assist the council in matters relating to the approval by the council, for the purposes of the training rules, of institutions situated in the area.
>
> "(3) An area nurse-training committee may, if authorised by the council so to do, conduct on their behalf any examination prescribed by rules made by the council under s. 3 of this Act or specified in a scheme adopted under the next following section."

No provision in this group of sections requires or enables the council itself to train nurses. By s. 15, all expenses incurred by an area nurse-training committee with the approval of the council are to be defrayed by the council, but with this should be read s. 26, which provides that:

> "All expenses incurred by the council with the approval of the Minister which are attributable to defraying expenditure incurred by area nurse-training committees (other than expenditure incurred by such committees in conducting examinations on behalf of the council) shall be defrayed by the Minister out of moneys provided by Parliament, and all other expenses incurred by the council under this Act shall be defrayed by the council."

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Section 23 enables the council to charge fees for certain services to nurses and others. Section 27 provides for penalties for false assumption of the title of registered or enrolled nurse, and s. 28 imposes penalties for the use of the title "nurse" by anyone who is not a duly registered nurse or assistant nurse. Section 30 confers on the council power to

> "... make rules for prescribing anything which by this Act is required or authorised to be prescribed and generally for making provision with respect to any matters with respect to which the council think that provision should be made for the purpose of carrying this Act into effect."

Rules have in fact been made under the provisions of that section, but no rule made by the council under the Act can come into operation unless and until it is approved by the Minister of Health.

I would accept, as a convenient summary of the provisions of the Act, the words of the Master of the Rolls (LORD EVERSHED):

> "It is, in our judgment, sufficient and sufficiently accurate to state that the purposes and functions of the council were and are to maintain a register of nurses, together with a roll of assistant nurses; to regulate accordingly the conditions of admission to and removal from the register and the roll, and, in connexion therewith, to exercise supervisory and directing powers in regard to training and examinations; and to exercise such other powers and duties as are ancillary to and consequent on the foregoing. The income of the council appears to be derived, in part, from fees which the council are authorised to charge on applications for examination and registration or enrolment and the like, and, as to the rest, from moneys directly or indirectly provided by Parliament."

In considering what are the main objects of the council, in the light of all the provisions of the Act, and whether these objects are charitable, it is right to turn first to *General Medical Council* v. *Inland Revenue Comrs.* (1) and *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2), already mentioned. In the former case, the Court of Appeal held that the General Medical Council was not "established for charitable purposes only" within s. 37 (1) (b) of the Income Tax Act, 1918. Counsel for the council in the present case, submitted that the *General Medical Council* case (1) was distinguishable on its facts from the present case; alternatively, that it was wrongly decided. My Lords, I shall not detain you by endeavouring to summarise the provisions of the statute which established the General Medical Council. Suffice it to say that, although there are certain differences between its provisions and the provisions of the Nurses Act, 1957, the two cases are, to my mind, indistinguishable as regards the main object of the bodies incorporated by these Acts respectively.

In the *General Medical Council* case (1) SARGANT, L.J., said:

> "I think myself that the whole scheme of this legislation is to regulate the profession of medical men, who in consequence have certain privileges conferred upon them by the legislation, and that it is in the first instance as a professional measure that the legislation is to be regarded. No doubt, as I have said, the result of that strict qualification and supervision will be to the public advantage. Exactly the same thing might be said of the regulations which govern the admission of qualified persons to the ranks of solicitors and barristers, or any other scientific profession. I agree with the Master of the Rolls that a very great deal is to be learnt from the judgments

(1) (1928), 97 L.J.K.B. 578; 139 L.T. 225.
(2) 1929 S.C. 664.

in *Inland Revenue Comrs.* v. *Forrest* (1) with regard to the Institution of Civil Engineers, and particularly in the distinctions which are drawn there by LORD WATSON between that case and the case with regard to the Writers to the Signet [*Society of Writers to the Signet* v. *Inland Revenue Comrs.*] (2). It seems to me that here we clearly have an institution or society which is of the same nature as the society known as Writers to the Signet, and that it differs from the Institution of Civil Engineers."

I agree with these observations, and, in my view, they can properly be applied to the council in the present case. I think that the council, formed as it is to exercise statutory powers and discharge statutory duties, has only one main object, namely, to regulate the profession of nursing in the manner and to the extent set out in the Nurses Act, 1957. The *General Medical Council* case (3) was, in my opinion, rightly decided, and the object which I have just stated is not a charitable object, giving to the word " charitable " its meaning in law, as established in many cases.

It follows from the view which I have just expressed that I cannot accept some of the expressions of opinion by the learned judges of the Court of Session in the *General Nursing Council for Scotland* case (4) as to the purposes for which that council was established, although I do not doubt that the court was right in following the *General Medical Council* case (3), and holding that the General Nursing Council for Scotland was not established " for charitable purposes only ". Before I leave the question of charity, I ought to refer to *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.* (5). In that case, this House held that the college was in law a charity, because its object was " the due promotion and encouragement of the study and practice of the art and science of surgery ", words which appeared in the recitals to its charter. The case is thus clearly distinguishable from the present case.

I now turn to the last question arising on this appeal. Having regard to my opinion that the sole main object of the council is to regulate the profession of nursing, in the manner and to the extent set out in the Nurses Act, 1957, that question must now be restated as follows:—Is that object, which is not charitable in the legal sense " otherwise concerned with the advancement of . . . social welfare "? My Lords, this is, to my mind, a question of great doubt, and I have found it difficult to choose between the two lines of argument so ably presented in this House; but in the end I find myself in agreement with the views which are about to be expressed on this point by my noble and learned friend, LORD KEITH OF AVONHOLM.

I would answer this last question in the negative, and would dismiss the appeal.

LORD TUCKER: My Lords, in order to succeed in this appeal the appellant council has to establish that it is an organisation whose main objects are charitable or are otherwise concerned with the advancement of social welfare. It was conceded by counsel in the courts below that, in view of the decision of the Court of Appeal in *General Medical Council* v. *Inland Revenue Comrs.* (3), he could not argue that the main objects of the council were charitable, but he formally took the point in order to enable him to contend in this House that the last-named case was wrongly decided. In my opinion, it was not open to him in these circumstances to invite your Lordships to distinguish the present

(1) (1890), 54 J.P. 772; 15 App. Cas. 334.
(2) (1886), 2 Tax Cas. 257.
(3) (1928), 97 L.J.K.B. 578; 139 L.T. 225.
(4) 1929 S.C. 664.
(5) [1952] 1 All E.R. 984; [1952] A.C. 631.

case from that of the General Medical Council, and I did not understand him to do so. I would add, however, that, having examined the facts in each case, I am satisfied that there is not sufficient ground for differentiation, nor am I persuaded that the decision in the *General Medical Council* case (1) was wrong.

My Lords, my noble and learned friend on the Woolsack has examined the provisions of the Nurses Act, 1957, and my noble and learned friend, LORD KEITH OF AVONHOLM, whose opinion I have had the advantage of reading, will also give a detailed examination of the Act. I, therefore, content myself with stating that such examination in my view discloses that the main objects of the council are (i) to maintain a register of nurses and roll of assistant nurses, and (ii) to make rules regulating the conditions of admission to the register and roll, neither of which, as distinguished from the ultimate benefits which may be expected to result from the legislation, are to be regarded as charitable.

With regard to the second limb of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which, in my view, can only be invoked if and when it has been decided that the main objects of the organisation are not charitable, I agree with the opinion which my noble and learned friend, LORD KEITH OF AVONHOLM, will shortly express.

I would, accordingly, dismiss the appeal.

LORD COHEN: My Lords, the questions which your Lordships have to decide are two—(i) Are the main objects of the appellant council charitable? If not, (ii) Are they otherwise concerned with " the advancement of . . . education or social welfare " within the meaning of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955? Strictly speaking, it might suffice to answer the second of those questions, but, as both were fully argued before your Lordships, I think it better to express my opinion on both questions.

Counsel for the respondent rating authority submitted that the only main object of the council is the keeping of the register with subsidiary duties of prescribing, training and conducting examinations and that this is not a charitable object. I cannot take so narrow a view of the Act. Looking at it as a whole, I think there were two main objects, on the one hand the enhancement of the qualities and status of nurses and, on the other, the benefit and protection of the public, particularly of the sick. I borrow this statement of the purpose of the Act from the judgment of the Master of the Rolls (LORD EVERSHED) ([1957] 3 All E.R. at p. 689). He did not have to consider the question whether, on this basis, the main objects of the council were charitable, since it was admitted in the Court of Appeal that, having regard to the decision of this court in *General Medical Council* v. *Inland Revenue Comrs.* (1), and of the Scottish Court of Session in *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2), the Court of Appeal could not hold that the objects of the council were charitable. Before us, however, counsel for the council submitted that the Scottish case was distinguishable, and that the *General Medical Council* case (1) was wrongly decided and could not be reconciled with the decision of this House in *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.* (3). In the last-mentioned case, the majority of their Lordships were able to find that the main object of the college was the improvement of the art and practice of surgery, and that, in so far as these were provisions which might be directed to the enhancement of the status of surgeons or the protection of their professional interests, they were purely ancillary. Their Lordships were, therefore, able to hold that the college

(1) (1928), 97 L.J.K.B. 578; 139 L.T. 225.
(2) 1929 S.C. 664.
(3) [1952] 1 All E.R. 984; [1952] A.C. 631.

was a charity. I was a dissentient in that case, but I accept of course the decision then reached. In the present case, however, I think it is impossible to hold that the enhancement of the qualities and status of nurses is a mere ancillary object of the council. It is, I think, a main object, and it is not charitable. I would answer the first question I have stated in the negative.

But although the enhancement of the qualities and status of nurses is not a charitable object, it does not necessarily follow that it is not " otherwise concerned with the advancement of . . . education or social welfare ". The Court of Appeal held that it was not, but I am unable to agree with them. On this point, I have had the opportunity of reading in print the speech which will in due course be delivered by the noble and learned lord, LORD SOMERVELL OF HARROW. I agree so fully with him that I shall state quite shortly my reasons for differing from the Court of Appeal. I agree with the Master of the Rolls that not every organisation established for benefiting the public can be treated as one the main objects of which are concerned with the advancement of social welfare. It is not easy to define exactly the meaning of social welfare but I am prepared to agree with counsel for the council that social welfare includes the relief of persons or classes of persons who, by reason of their circumstances, are in special need of relief of a kind analogous to that contemplated by the statute 43 Eliz. 1 c. 4. I think that an organisation established for the purpose of assisting in the provision of such relief is an organisation concerned with social welfare within the meaning of s. 8 of the Act of 1955.

Now what is the position of the council? I would adopt the language of the Lord President (LORD CLYDE) in *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (1), where he said the " object was to raise the standard of sick-nursing in Great Britain ". In view of what I have already said, I must, however, qualify his statement by adding that the council has also the object of enhancing the status and qualities of nurses. Now the nursing of the sick is, in my opinion, relief plainly analogous to that contemplated by the statute of Elizabeth and, if the provision of skilled nurses for the nursing of the sick had been the sole object of the council, I cannot doubt that it would have been " otherwise concerned with social welfare " within the meaning of the section. It is said that the professional aspect of the other objective, " the enhancement of the status and qualities of nurses ", excludes the council from the benefit of the section. But the two objects are, as was said by the Master of the Rolls, essentially inseparable. If I had to say which was " primus inter pares ", I should unhesitatingly choose the protection of the public by the provision of skilled trained nurses. Moreover, the council has an educational flavour through its responsibilities in connexion with training and examinations. In these circumstances, it seems to me that both the main objects of the council are concerned with social welfare, and that your Lordships would be placing too narrow a meaning on the wide words of the section if your Lordships were to exclude the council from the relief granted by the section merely because the aspect of good works to which the Master of the Rolls refers is missing from its functions. I would allow the appeal.

LORD KEITH OF AVONHOLM: My Lords, on the view I take, this case lies within a very short compass. For a time I thought it might be decided on the broad ground that, to use the words of LORD PRESIDENT CLYDE in *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (1), the object of the appellant council " was to raise the standard of sick-nursing ". I have come to the view, however, that that would be to proceed on a false premise. For one

(1) 1929 S.C. 664.

thing, the statement is something in the nature of a surmise or speculation. There is nothing in the Nurses Act, 1957, or its statutory precursors, that says this is the object of the council. There may be some, if not many, for all I know, who would say that the standard of sick nursing was as high fifty years ago as it is today. It may be that one result of the Act is to increase the number of persons who reach the standard. But that again may be no more than the result of economic, social and political changes in the structure of society. There are other surmises that are equally possible as, for instance, that the purpose was to improve the status and protect the profession of nurses.

In my opinion, the only way by which the main objects of the council can be ascertained is by looking at the objects as expressed in the Act. It is by the language used that Parliament has expressed its intention and it is with the objects for which the council was immediately and directly constituted that we are, in my opinion, concerned, and not with the results of its activities at second or third hand. When I turn to the Act, I find only two main objects for which the council was constituted. First, it has to maintain a register of nurses, a roll of assistant nurses and the list of persons, neither registered nor enrolled, who, within two years of the passing of the Nurses Act, 1943, were admitted to the list in respect of training in nursing prior to July, 1925. Copies of the register, the roll and the list are to be open for inspection by the public. Its second main function is to make rules for regulating the conditions of admission to the register and to the roll and the conduct of examinations which may be prescribed as a condition of such admission. These conditions are to include prescribed training and prescribed experience in nursing and the prescribed training shall be carried out in an institution approved by the council or in the service of the Admiralty, the Army Council or the Air Council. These rules must be approved by the Minister of Health, and are incorporated in a statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament. These two functions are undoubtedly closely related, and it might be possible to express them as one object, but I am content to take them as two objects. Everything else in the Act affecting the council is, in my opinion, properly incidental to these two main functions.

It may be observed that, though the council prescribes the course and syllabus of training and approves the training institutions, area nurse-training committees are separately constituted by the Minister to concern themselves with the training of nurses and to advise and assist hospital management committees and boards of governors of teaching hospitals and other authorities and persons engaged in the training of nurses in the preparation and carrying out of schemes for such training in accordance with the council's requirements. The cost of training incurred by hospital management committees and teaching hospitals is defrayed by the nurse-training committees, who recover the amount from the council, who, in turn, recover the money from the Minister out of moneys provided by Parliament. In my opinion, the functions of the area nurse-training committees stand apart from those of the council, though they are, of course, helpful to the council in securing the entry of properly qualified nurses to the register and the roll.

It may be further observed that the council, being a statutory body, is strictly confined within its powers as fixed by the statute, and at various points can only act with the approval of the Minister. It must report annually to the Minister as to the discharge of its functions with respect to the training of nurses, and the Minister must lay the report before Parliament. In my opinion the respondent rating authority are right in their submission, as stated in the first reason in their Case, that the council is established for the purpose of exercising statutory

powers and carrying out statutory duties relating to the keeping of a register of nurses, if it be remembered that one of these duties is concerned with the training of nurses in so far as the council has to prescribe courses of training and approve training institutions under s. 3 of the Act, in order that nurses may achieve the standards of knowledge and experience necessary for admission to the register or roll.

The question is whether the two objects to which I referred at the outset "are charitable or are otherwise concerned with the advancement of religion, education or social welfare". The first of these main objects, the registration of nurses, if considered by itself, clearly could not, in my opinion, be regarded as either charitable or concerned with social welfare. But, it is said, the conditions as to training and experience, imposed as a pre-requisite of registration, make the council a charitable organisation, because these conduce to the advancement of the nursing of sick persons which is a charitable object. But, assuming for the moment that this is a consequence of imposing these conditions, that cannot, in my opinion, be said to be the reason why they were imposed. The reason was to secure that only properly qualified persons should be registered. That clearly was the direct object indicated by the Act. We are not concerned with indirect consequences nor entitled to speculate on what ultimate purposes, if any, Parliament had in view. Apart from this, the hypothesis of the council may, I think, be questioned. In the days when hospitals trained their own nurses, independently of outside regulation, and were treated as charitable institutions, it was not, as I understand it, because they trained nurses for sick nursing that they were treated as charitable institutions, but because they were established for nursing the sick poor. The present case is not like that of *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.* (1), where the objects were the due promotion and encouragement of the study and practice of the art and science of surgery. So far as the Nurses Act, 1957, guides us, the council was created to provide a register and roll of nurses and impose rules to secure that they were properly qualified for admission. The Act expressly states in s. 3 (2) (b), as one of its aims, the securing of a uniform standard of qualification in all parts of the United Kingdom. I have no doubt the Act was of public benefit, as one must assume most legislation to be. But the question is: Was what the council was created to do and does charitable? I cannot hold that it was. It may be that, at some distance more or less remote, what it does redounds to the interests and benefit of charitable organisations. So is it when a benefactor does something for a charity. But that does not create him a charity. The test of the matter, in my opinion, is to consider the content, or character, of the functions discharged by the council and ask are these charitable. I cannot hold that they are.

I have not referred so far to the sections of the Act which make it an offence for a person not duly registered to take or use the name or title of registered nurse, or for a person not duly enrolled to pass herself off as an enrolled assistant nurse, or for a person to use the name or title of nurse (with certain exceptions) who is neither a registered nurse nor an enrolled assistant nurse. If it is legitimate to look at the effect of the Act at all, as distinct from the actual functions imposed by the Act on the council and their content, it appears to me to be easier to say that one of its results was to raise the professional status of nurses and to protect them in the exercise of their profession, than to say the result was to advance the nursing of sick persons. From this point of view, I think the case is indistinguishable from *General Medical Council* v. *Inland Revenue Comrs.* (2).

(1) [1952] 1 All E.R. 984; [1952] A.C. 631.
(2) (1928), 97 L.J.K.B. 578; 139 L.T. 225.

I think also that the present case is, as ROWLATT, J. (with whom LORD HANWORTH, M.R., was prepared to agree), thought that case was, another instance of an organisation performing administrative functions under Parliamentary authority which, though for the public benefit, can in no sense be regarded as a charitable nature. I agree with those of your Lordships who think that that case was rightly decided.

I turn now to consider whether the council comes under the other limb of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, as being an organisation whose main objects "are otherwise concerned with the advancement of . . . social welfare". The considerations which influenced me on the charitable aspect of the matter seem to me to be equally applicable here. However wide a meaning is given to "social welfare" or to "the advancement of social welfare", the objects or functions of the council, in my opinion, are not concerned with either. DANCKWERTS, J., taking the view apparently that the council was established in the general public interest, held that it came within the sub-section. It was not established, he said:

> "for the purpose of raising the professional status of the nurses, but for the purpose of creating a system of registration so as to prevent incompetent nurses being able to victimise the public, and for making sure that the public should receive the services only of competent nurses. That seems to me to be the establishment of a body for the purpose of benefiting the public, and, therefore, for a purpose of social welfare".

But, accepting the hypothesis on which he bases his conclusion, I cannot accept public benefit as the test of social welfare, though social welfare may be a public benefit, and counsel for the council were not able to support this view of the learned judge. I would accept the words of the Master of the Rolls (LORD EVERSHED) where he says:

> ". . . it is not enough that the objects of the organisation are in some degree related to the advancement of social welfare: they must in a real sense be directed to it."

For the reasons I have given, the objects of the council are not, in my opinion, "directed" to social welfare.

If I had felt myself compelled to take a different view, the council would still have been faced with a difficulty. It could not, in my opinion, be said that the mere keeping of a register or roll of nurses was an object concerned with the advancement of social welfare. It would have to be said that this was merely incidental to the one and main object of the council, to secure the proper training of nurses which was an object of social welfare. This, to my mind, would be to put a forced construction on the Act. A more natural construction, I think, would be that the main object is to maintain a register and roll, and that the other was ancillary to that purpose. But, on the assumption that there are two main objects, one of which is concerned with the advancement of social welfare and the other is not, it would be impossible, in my opinion, to say that the "main objects" were concerned with the advancement of social welfare.

For the other reasons, however, which I have already stated, I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, is framed in words capable of a very wide construction. I cannot think it would be possible to replace them

by some other words without altering what Parliament has enacted. I accept what was said by LORD DENNING in *National Deposit Friendly Society (Trustees)* v. *Skegness U.D.C.* (1):

> "The main objects which are 'otherwise' concerned must, I think, be objects that are akin to charitable objects—have some kindred quality with charitable objects."

In considering the objects or object of the appellant council, one must consider the Act. In considering the substantially similar position of the General Nursing Council for Scotland, LORD CLYDE (Lord President) said in *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2):

> "If I tried to define the council's purpose in a single sentence, I should say its object was to raise the standard of sick-nursing in Great Britain."

In that case, the question was whether the council was a charity. It was held it was not, because the objects included a protection of the calling as well as the education of nurses and improvement of nursing. We have not to consider here whether the council is a charity. Even under the first part of the sub-section it is sufficient if the main object or objects are charitable. I, therefore, get little, if any, assistance from the decision in the case cited or from *General Medical Council* v. *Inland Revenue Comrs.* (3). I think the question here is whether the objects of the council are for the advancement of social welfare, in the somewhat limited sense stated above. If so, it does not matter whether those objects are charitable in the legal sense or not. I would assume that the sub-section was framed so that valuation officers could apply it without getting embogged in the technicalities of the law relating to charities.

I would amplify LORD CLYDE'S statement by reference to the Nurses Act, 1957. The council has to prescribe the training and experience, and to regulate the conduct of examinations to be prescribed. The rules provide for a period of three years' training, for a general register, for a register for mental cases, for children's cases and for fever nurses (S.I. 1951 No. 1372, r. 16). There is a syllabus for the preliminary and final examinations (ibid., Sch. 3) which shows the width and amount of knowledge required. The council has to approve the institution in which training is to be carried out, apart from state military hospitals. Section 11 provides for the setting up by the Minister of "area nurse-training committees" which are to prepare and carry out schemes in accordance with any requirements of the council. A person who is not on the register cannot use the name or title of nurse, with a proviso excepting children's nurses.

In my opinion, the advancement of the care of the sick is an advancement of social welfare within s. 8 (1) (a) of the Act of 1955. I agree with DANCKWERTS, J., that there is nothing in the section or the English language to indicate that only poor persons are to be regarded as a subject of social welfare. It was, of course, in earlier days the poor who suffered most, from the absence of adequate nursing. I would have thought it clear that the primary object was to promote and improve the art and practice of nursing. It may be that this could have been attained without the privilege to which I have referred being conferred on those on the register. I, therefore, accept the finding of the Court of Appeal that there are two main objects. This is a public Act, and I would, myself, have regarded the improvement of nursing as the primary object. I would, myself, have thought that Parliament improved and protected the status of

(1) [1958] 2 All E.R. 601.
(2) 1929 S.C. 664.
(3) (1928), 97 L.J.K.B. 578; 139 L.T. 225.

those who nursed as a means of improving nursing, but I am prepared to accept this improvement and protection as a main object within the sub-section and not as merely subsidiary. I do not get much assistance from the fact that the provisions of the Act can be described as regulating the nursing profession. If a profession is within the social welfare field, its regulation may be the best and only reason for the advancement of social welfare. It will depend on the nature of the regulation. In the present case, and here I differ from the Court of Appeal, I hold that the enhancement of the status of nurses as provided by the Act is, in itself, for the advancement of social welfare. Both main objects, therefore, are within the sub-section. I would, therefore, allow the appeal.

Appeal dismissed.

Solicitors: *Pontifex, Pitt & Co.*; *Sharpe, Pritchard & Co.*

G.F.L.B.

HOUSE OF LORDS

(Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Keith of Avonholm and Lord Denning)

December 11, 15, 1958, January 28, 1959

SHELL-MEX AND B.P., LTD. *v.* HOLYOAK (VALUATION OFFICER)

Rates—Valuation—Plant and machinery—Underground petrol tank at petrol station—Plant and Machinery (Valuation for Rating) Order, 1927 (*S.R. & O.* 1927, *No.* 480), *sched. class* 4—*Rating and Valuation Act*, 1925 (15 & 16 *Geo.* 5, *c.* 90), s. 24 (1).

At a petrol filling station for motor vehicles there were installed underground four tanks, each of three thousand gallons capacity, to be used for the storage of petrol. Each tank was constructed of metal and was cylindrical in shape, and was delivered to the site as a complete unit, thirteen feet six inches in length and seven feet in diameter, and weighing when empty about two tons. Each was installed in a pit measuring internally eight feet six inches by fifteen feet by nine feet, the floor of which was covered by a concrete slab, nine inches thick. The walls of the pit were of brick, nine inches thick, and the pit was covered with a concrete slab six and a half inches thick which formed an extension of the forecourt to the filling station. There was access to the pit by a manhole supported on rolled steel joists. Each tank rested by its own weight on three concrete cradles, twelve inches in height, on the floor of the pit, and the space around the outside of the cylinder and between it and the walls of the pit was filled with sand. A tank could only be removed from its pit by demolishing the concrete covering. Under s. 24 (1) of the Rating and Valuation Act, 1925, and class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, no account was to be taken, when valuing a hereditament for rating, of tanks in or on the hereditament, save when a tank was, or was in the nature of, a building or structure. It was admitted that each tank in the present case, when considered by itself, was not a building or structure or in the nature of a building or structure, but it was agreed that each of the pits or chambers in which the tanks were was itself a building or structure.

Held: (Lord Keith of Avonholm and Lord Denning dissenting): the tanks did not fall to be rated as part of the hereditament because, although the cylinders were " tanks " within class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, they were not themselves, nor were they in the nature of, buildings or structures, and the placing of the clinders in their compartments did not change them into, or into the nature of, buildings or structures within class 4 as each being part of a unit comprising a pit and the tank within it.

Decision of the Court of Appeal, (1958), 122 J.P. 129, reversed.

APPEAL by the ratepayers, Shell-Mex and B.P., Ltd., from an order of the Court of Appeal (LORD EVERSHED, M.R., PARKER and SELLERS, L.JJ.), reversing a decision of the Lands Tribunal.

The appellants had appealed to the Lands Tribunal from a decision of a local valuation court of Warwickshire Local Valuation Panel given on Feb. 21, 1956, directing that the assessment of a hereditament known as Oaklands Filling Station, Birmingham Road, Budbrooke, in the valuation list for Warwick rural district should be increased from £25 gross value, £18 rateable value, to £80 gross value, £64 rateable value.

Widgery, Q.C., and *Roots* for the ratepayers.
Lyell, Q.C., and *P. R. E. Browne* for the valuation officer.

Their Lordships took time for consideration.

Jan. 28. The following opinions were read.

VISCOUNT SIMONDS: My Lords, it is not surprising that in this case there should have been a difference of opinion between the Lands Tribunal before whom it originally came and the Court of Appeal from whose decision an appeal has been brought to this House, nor that your Lordships should be unable to agree on the matter. For, in truth, the arguments on either side are nicely balanced, and I have not easily reached the conclusion that the appeal should be allowed and the decision of the tribunal restored.

The primary facts have been found by the tribunal and are not in dispute. The appellants are the owners and occupiers of a hereditament known as the Oaklands Filling Station, Birmingham Road, Budbrooke, in the rural district of Warwick. It is a familiar type of wayside petrol filling station for motor vehicles, consisting of a single building for office, stores and showroom and a concrete forecourt with three petrol pump islands each accommodating two pumps. These pumps are connected by underground pipes to four tanks each of three thousand gallons capacity at the side of the building. These tanks which are constructed of metal and were delivered at the site as complete units are cylindrical in shape, thirteen feet six inches in length and seven feet in diameter, and weigh when empty about two tons. Each of them was installed underground on the premises in accordance with plans approved by the local authority and a licence granted by them under the Petroleum (Consolidation) Act, 1928. The method of installation was as follows: a pit was excavated, its floor was covered with a concrete slab, brick walls nine inches thick were then built round the sides of the pit and lined internally with cement. The internal dimensions were eight feet six inches by fifteen feet by approximately nine feet. Concreted cradles twelve inches in height were laid on the floor of the pit and the tanks laid on the cradles. The pit was then filled with sweet sand, to absorb any possible leakage and to reduce the risk of explosion, and the whole covered with concrete 6½ inches thick, a manhole with cover supported on rolled steel joists giving access through the concrete to the top of the tank. This concrete covering forms an extension of the forecourt at the side of the building. Each tank is in a separate similar compartment, and is connected by underground pipes to one or two of the pumps but not to the other tanks. It was agreed between the parties at the hearing before the tribunal that each of the tanks formed part of the plant installed at the filling station, and it was admitted by counsel for the respondent that, looked at by itself, it was neither a building nor structure nor in the nature of a building or structure. It was further agreed that each of the compartments was itself a building or structure or in the nature of a building or structure. I have mentioned the licence granted by the local

authority, and this document, with the plans annexed to it or exhibited with it, assumed some importance. But I doubt whether it should have much weight in construing the Act and order to which I now refer.

The Rating and Valuation Act, 1925 (which made a substantial alteration in the law in regard to the rating of plant and machinery), provided, by s. 24 (1), as follows:

> "For the purposes of the making or revision of valuation lists . . . the following provisions shall have effect with respect to the valuation of any hereditament . . . (a) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in Sch. 3 to this Act shall be deemed to be a part of the hereditament: (b) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament."

Under and by virtue of an order made under later sub-sections of the same section (the Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927 No. 480)), the classes of machinery and plant deemed to be part of the hereditament under the said Sch. 3 to the Act included class 4 described as

> "The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure . . ."

Then followed numerous items of which I give as specimens "blast furnaces", "bins and hoppers", "conveyor gantries", "flues", "foundations, settings, gantries, supports, platforms and stagings for plant and machinery" and "tanks".

The question at issue can now be stated. It is whether the metal containers, which I have without prejudice referred to as tanks, fall to be rated as part of the hereditament known as the Oaklands Filling Station. This question can be answered in the affirmative only if (i) they are "tanks" within the meaning of the order, and (ii) they are buildings or structures or in the nature of buildings or structures. The Local Valuation Court having held that these conditions were fulfilled and rated the hereditament accordingly, the present appellants appealed to the Lands Tribunal (Mr. ERSKINE SIMES, Q.C.). That tribunal allowed the appeal, concluding that the only part of the installation which could properly be called a tank for the purpose of the order was the metal cylinder, and that the compartment in which it was housed did not form a functional entity with it any more than any other building in which a piece of plant or machinery is housed. The tribunal said:

> "That compartment appeared to me to form an integral part of the hereditament like any other building thereon but the metal tank which is admittedly not a building or structure or in the nature of a building or structure looked at by itself should not under s. 24 and the order be deemed to be a part of the hereditament."

The expression "functional entity" was taken from the judgment of JENKINS, J., in *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.* (1). I must with great respect doubt whether so vague and elastic an expression is of any real assistance in determining whether a piece of plant or machinery is, or is in the nature of, a building or structure.

The present respondent (the valuation officer) appealed to the Court of Appeal on a Case Stated by the tribunal on the grounds that the tribunal misdirected itself and was wrong in law in holding that the only parts of the underground

(1) 113 J.P. 78; [1949] 1 All E.R. 27; [1949] 1 K.B. 385.

installation referred to in the Case Stated which could properly be described as " tanks " for the purposes of the order were the metal cylinders therein referred to, and that, although the said metal cylinders were not, looked at by themselves, buildings or structures or in the nature of buildings or structures, each of them as installed on the hereditament in question was, or was in the nature of, a building or structure within the meaning of the said order.

The appeal was allowed by the Court of Appeal. LORD EVERSHED, M.R., observed that he had, in the course of his judgment in *W. Collier, Ltd.* v. *Fielding* (*Valuation Officer*) (1), made the point that, when the question arises as to some identifiable piece of apparatus, whether and to what extent it is in the nature of a structure, that question is prima facie a matter of degree and of fact. And he added:

> " So also . . . it will be prima facie a matter of fact to say what constitutes the thing to be identified with the item in the catalogue in any case. Therefore, if, after examining the material and perhaps the site, the tribunal had merely said, ' I conclude that the tank here is no more than the cylinder ', that might well have been the end of the matter, but the tribunal has not so confined itself."

The Master of the Rolls then explained that, in his view, the tribunal had materially misdirected himself and summed it up thus:

> " With all respect, it seems to me that the fallacy lies in this sentence: ' But it seems to me that the compartment in which the tank is housed does not form a functional entity with the tank any more than any other building in which a piece of plant or machinery is housed '. I have been unable to escape from the conclusion that in the end the tribunal came to the view that what it called ' the compartment ', the installation other than the cylinder, was no more relevant to the question of the rating of the cylinder in this case than would be an ordinary above ground edifice in which a cylinder, a tank, happened to be found, resting on a cradle. In my judgment, quite manifestly that is not so."

The learned judge thought that the reasoning to which he had referred disabled the conclusion of the tribunal and allowed the appeal, saying that the tank on the hereditament in question was the installation in its entirety, in which case there was no question but that the whole of it was of the nature of a structure.

PARKER, L.J., in my view, rightly pointed out that the question was what, not in relation to the licence but in relation to the hereditament, was properly described as the tank, and concluded that, looking at the primary facts found by the tribunal, the only reasonable conclusion was that the whole structure, walls and metal lining, themselves formed " the tank ". He referred to the purpose of the installation, viz., the storage of petrol, and, though he did not use the expression " functional entity ", he relied, I think, on the fact that, in his view, the brick and concrete structure without the lining performed no function at all, and, equally, the lining without the walls and concrete performed no sensible function. It was, he thought, a case where the so-called chamber was a housing which formed part of the plant itself. SELLERS, L.J., agreed, thinking that the significant matter was that these tanks were for the storage of petrol and that the matter must be so viewed. It would not, he said, be sufficient to have the petrol simply in the cylinder; it had to be dealt with in some manner similar to that in which it was dealt with here for the purposes of safety and proper user; the manner of protecting or lagging or

(1) 122 J.P. 222; [1958] 1 All E.R. 694.

securing it had turned what was simply a cylinder into a structure or building; he could not think that in law or in fact it would be sensible or realistic to split the two things up; what had been called the structure or building and the cylinder formed one tank for the purpose of storage of petrol and it should be so regarded.

My Lords, I have referred to these judgments at some length because they express in their most cogent form the arguments which the appellants must meet. They meet them very simply. They ask whether the so-called metal cylinder is not properly called a tank. It clearly is; no one has suggested the contrary. I do not, as I have said, attach great importance to the language of the licence or to the legends on the plans, but it has some significance that, in the ordinary user of words by persons accustomed to deal with these things, the "tank" is the metal container. It is a thing which is to be "tilted to simplify extraction of sludge", and a thing of which it can be said that the sand in-filling is not to be laid until the air test of it has been completed. There are, indeed, other passages in which the whole installation appears to be referred to as a tank. But it is at least abundantly clear that the metal cylinder alone can be, and is properly identified as, a "tank". So far the appellants make good their case. Nor have they, I think, any difficulty in their next step. For it is clear, as was admitted, that the metal cylinder, looked at by itself, is not, and is not of the nature of, a structure or building. Now they face the final difficulty. It is said that, though the metal cylinder is by itself a tank and by itself is not of the nature of a structure or building, and though the compartment is not by itself a tank, yet when the metal container is put into the compartment, the whole installation becomes a tank for the purposes of the order: "what was", in the words of SELLERS, L.J., "simply a cylinder" has been "turned into a structure or building". To this the simple answer is made, that it is not a case of that which was a tank being turned into a structure, but of that which was a tank remaining a tank, and being housed in a structure made for that purpose. It appears to me, my Lords, that this is a question of great nicety, and I am by no means satisfied that it is not a question of fact on which the finding of the tribunal should not be disturbed. So, as it appears to me, the Master of the Rolls would have held but for the passage in the judgment of the tribunal which I have already cited. If it is not a question of fact, I am not very clear what is the question of law that is involved. I would agree that the tribunal was in error in so far as it made functional entity the test, though, as I have pointed out, two at least of the judgments in the Court of Appeal were not altogether free from the same error. It is, in my view, an error because it entirely depends on what is the function which is in mind. It is equally true to say that it is the function of the whole installation to store petrol, or to say that it is the function of the metal container to contain petrol and that of the compartment to protect the container and minimise any danger to it or to the public if it did not function properly. This leaves the question unanswered to which an answer must be given. Then the test was suggested of *physical* entity, but I fear that this is a case of obscurum per obscurius. For, if the whole installation can be described as a physical entity, as probably it can, so also was the metal container a physical entity when it was placed in the compartment, so it is while it remains there and so it will be if and when it is removed as it easily can be. The question remains whether there is a "tank" formed by the whole installation or a "tank" which is housed within a structure. I have come to the conclusion that the latter view is correct. It is with diffidence that I do so in face of the unanimous opinion of the Court of Appeal. But I think that paramount weight should

be given to the consideration that, beyond doubt, the metal container is a tank, and is identifiable as a tank wherever it may be placed, whether above ground or under ground and by whatever structure it may be protected. If it is a tank, it is not for rating purposes to be regarded as part of the hereditament unless it is, or is in the nature of, a building or structure. I do not think that any finding of fact would justify that conclusion.

I would allow the appeal and restore the decision of the tribunal with costs here and below.

LORD MORTON OF HENRYTON: My Lords, the question for decision on this appeal arises under s. 24 of the Rating and Valuation Act, 1925, and the Plant and Machinery (Valuation for Rating) Order, 1927, made thereunder. It is convenient to set out at once the relevant provisions of the section, and of Sch. 3 to the Act, as settled by the Order of 1927. They are as follows:

> " 24—(1). For the purpose of the making or revision of valuation lists . . . the following provisions shall have effect with respect to the valuation of any hereditament . . . (a) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in Sch. 3 to this Act shall be deemed to be a part of the hereditament: (b) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament.
>
> . . . . .
>
> " Schedule 3.
>
> " Classes of machinery and plant to be deemed to be part of the hereditament . . . Class 4. The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure."

The schedule then sets out a long list of items, including such items as racks, refuse destructors and incinerators, retorts, silos, stills, superheaters, tanks, vats, weighbridges and windmills. The relevant item for the present purpose is " tanks".

This appeal relates to an installation used for the storage of petrol which is to be supplied to the public from petrol pumps on a roadside petrol filling station of the usual type, owned and occupied by the appellants. The installation, and the method by which it was constructed, are described in the decision of the Lands Tribunal and illustrated by a plan and drawing exhibited to the Case Stated. A pit was dug and its floor was covered with a concrete slab; brick walls nine inches thick were built round the sides of the pit and lined with cement, and the pit was divided into four compartments by similar walls built across it. Each of these compartments is fifteen feet long, eight feet six inches wide and nine feet deep. On the floor of each compartment are installed three concrete cradles twelve inches in height, on which rests by its own weight a metal cylinder thirteen feet six inches long and seven feet in diameter. Each of the four metal cylinders (one in each compartment) weighs about two tons and has a capacity of three thousand gallons. The space round the outside of the cylinder, and between it and the walls of the compartment, is filled with sweet, dry sand to absorb any possible leakage and to reduce the risk of explosion. The whole pit is covered with a concrete slab 6½ inches thick which forms an extension of the forecourt of the filling station. There is access to each cylinder by a manhole supported on rolled steel joists, but otherwise each compartment is completely enclosed, and the cylinders could only be removed by demolishing the concrete covering.

At the hearing of the appeal in this House, counsel for both parties were agreed (a) that each of the metal cylinders, when considered by itself, can

properly be described as a " tank ", and is neither a building or structure nor in the nature of a building or structure, within the meaning of class 4 already quoted; (b) that each of the four compartments, by itself and apart from the metal cylinder, is not a tank, and is a building or structure, or in the nature of a building or structure, rateable as part of the hereditament; (c) that there are four " tanks " on the premises, within the meaning of that word as used in class 4. The only question arising on this appeal is whether the four " tanks " are the four metal cylinders or the four complete installations, including the metal cylinders, which I have already described. The appellants contend that the former view is correct, and, if they are right, the metal cylinders will not be rateable, although the four compartments containing them will be rateable. The respondent contends that the latter is the correct view, and that, consequently, the four complete installations are rateable.

My Lords, the Lands Tribunal accepted the contention of the present appellants, and I agree with him. I turn first to the Act of 1925 and Sch. 3. Section 24 (1) of the Act, read in conjunction with class 4 in the schedule, deems to be part of a hereditament and rateable accordingly,

> " the following *parts* of a plant or combination of plant and machinery, whenever and only to such extent as any such *part* is, or is in the nature of, a building or structure."

I have emphasised the words *part* and *parts* because it seems to me vital to bear in mind that class 4 is dealing with parts, and nothing but parts, so that, when " tanks " are mentioned in the list, they are mentioned as part of a plant. It is rightly conceded by counsel for the respondent that each metal cylinder, if it were not enclosed at all, or if it were placed in a large room, would be a tank within class 4 and would not be included in the valuation of the premises for rating purposes, because it would not be, or be in the nature of, a building or structure. They contend, however, that each cylinder loses its identity as a tank when it is in the underground structure already described, and thereupon the whole of each underground installation becomes a tank within class 4 and is rateable as a whole because it is, or is in the nature of, a building or structure. My Lords, I cannot accept this contention. The position might well be different if the metal cylinder were so linked with the surrounding compartment as to become one physical entity with it—for instance, if the space now filled with sand were filled with concrete adhering to the cylinder. As it is, the cylinder is simply a tank which has been placed in an underground structure, and surrounded with sand, for safety reasons. It is not a physical entity with the compartment, but can be lifted out and replaced again at the will of the owner, still in exactly the same condition, although it would be necessary, as I have said, to demolish the concrete covering before removing the cylinder. If the respondent's contention were correct, the cylinder would again become a " tank " when it emerged from the pit, and would lose its identity as such if and when it was replaced in the pit. This seems to me a highly artificial conception.

It was suggested on behalf of the respondent that the whole of the underground installation formed a " functional entity " and that it was this functional entity which formed the " tank " within class 4. The phrase " functional entity " appears in the judgment of JENKINS, J., in *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.* (1), and that case was read to the House, but the facts differ so widely from the facts of the present case that I do not find the *Cardiff* case (1) of assistance to

(1) 113 J.P. 78; [1949] 1 All E.R. 27; [1949] 1 K.B. 385.

either party. My Lords, in my opinion, this contention on behalf of the respondent also fails. I would accept the view advanced by counsel for the appellants that the placing of a tank within a building or structure, whether for convenience of operation or to protect the tank or to protect persons from nuisance or risk emanating from the tank, does not cause the building or structure to become a functional entity with the tank which it contains or vice versa. The tank and its functions remain unaltered by the building which contains it, and, similarly, the nature and function of the building remains unaltered by the tank which it contains.

I find some confirmation of the views which I have formed, that the " tank " is the metal cylinder and not the structure which surrounds it, in the wording of the licence to keep petrol on the premises which the appellants had to obtain from the local authority, and in the wording which appears on the plan which is exhibit B to the Case Stated. It seems to me reasonably clear that the word " tank ", when used in the " Schedule of conditions " indorsed on the licence, refers to the metal cylinder, and clear beyond doubt that the same word, when it appears in exhibit B, has the same meaning. It would not, of course, be legitimate to construe the Act of 1925 and the schedule by reference to such documents, but class 4 is a list of parts of business installations, and the licence and the plan deal with business matters. It is, therefore, interesting to observe that the word " tank " is used in such documents as applying to the metal cylinder and not to the complete installation.

It was suggested in the course of argument that the following sentence, in the decision of the Lands Tribunal, is a finding of fact from which there is no appeal:

> " I have come to the conclusion that the only part of the installation which can properly be described as a ' tank ' for the purposes of the order is the metal cylinder."

The tribunal went on to give its reasons for this view and the Court of Appeal thought that it had misdirected itself. As I find no misdirection, and agree with the passage just quoted, I do not find it necessary to express an opinion whether the passage ought, or ought not, to be treated as a finding of fact.

I would allow the appeal.

LORD REID: My Lords, I need not restate the facts. The case turns on the proper construction of the item " tanks " in class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927 No. 480), and that requires consideration of the structure and apparent purpose of this order and of s. 24 of the Rating and Valuation Act, 1925, under which the order was made. This section de-rated all plant and machinery with certain exceptions. The original exception was that

> " . . . with respect to the valuation of any hereditament . . . (a) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in Sch. 3 to this Act shall be deemed to be a part of the hereditament."

And the relevant part of Sch. 3 was:

> " 4. Such part of any plant or any combination of plant and machinery, including gas holders, blast furnaces, coke ovens, tar distilling plant, cupolas, water towers with tanks, as is, or is in the nature of, a building or structure."

Section 24 of the Act of 1925 gave power to make an order to be substituted for Sch. 3, and this order was duly made for that purpose. The schedule to the order sets out the "Classes of machinery and plant to be deemed to be part of the hereditament". Under class 4 are included:

> "The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure."

Then there follows a long list of items including "tanks". Class 4 deals with "parts of a plant" and, looking to the descriptions of a number of the items in it such as burners, crane gantries and stagings, it seems to me to be clear that they need not be, and in some cases cannot be, capable of working as separate self-sufficient units. So the order requires one to pick out of the whole installation of plant and machinery those bits which correspond to any of the items mentioned in the list, irrespective of whether or not they require to be associated with other things in order to produce any useful result. Then the next step is to consider whether each bit of plant so picked out is, or is not, taken by itself, a building or structure or in the nature of a building or structure. If it is, then it is to be taken into account in valuing the hereditament; but if it is not, then it is not to be taken into account.

In the present case, metal cylinders which hold petrol are enclosed in underground chambers and the spaces between the walls of the chambers and the cylinders are packed with sand; a cylinder could not be taken out without breaking the roof of its chamber. I assume, although this is not very clearly stated, that, for practical purposes, the cylinder and its chamber are a unit; this arrangement is necessary for reasons of safety, and without such an arrangement the cylinder would not be allowed to be used. But it seems clear that the purpose of the chamber and the sand is not to contain the petrol, it is to minimise danger if there should be a leakage of petrol from the cylinder. What, then, is the "tank" within the meaning of the order? Is it the whole unit, chamber sand and cylinder, or is it simply the cylinder? It has not been argued that any technical meaning attaches to the word "tank" in the order, and it must, therefore, be taken as an ordinary word of the English language to be construed in light of the context in which it is found. The question is crucial because a "tank" is not rateable unless it is in the nature of a building or structure. If the whole unit, chamber sand and cylinder, is the tank, then, admittedly, it is of that nature and is rateable. But if the cylinder alone is the tank, then admittedly it is not, taken by itself, in the nature of a building or structure and it is not rateable; on that view only the chamber is rateable.

The Court of Appeal, as I read their judgments, have decided in favour of the respondent because the whole unit is a "functional entity". The reasoning is stated succinctly by SELLERS, L.J.:

> "The significant matter is that these tanks are for the storage of petrol, as my Lord has just indicated. The matter has so to be viewed. The mere cylinder would be quite insufficient for that purpose having regard to the liabilities of the occupiers, who are the [appellants]. It would not be sufficient to have the petrol simply in the cylinder. It has to be dealt with in some manner similar to that in which it is dealt with here for the purposes of safety and proper user. The manner of protecting it or lagging it or securing it has turned what was simply a cylinder into a structure or building. I cannot think that in law or in fact it would be sensible or realistic to split the two things up."

I agree that, in fact, from a practical point of view, it would not be sensible or realistic to split the two things up. But, as I have said, it appears to me to be the purpose of this legislation to split up for rating purposes installations which are for practical purposes indivisible. I must, therefore, leave out of consideration the functional connexion between the chambers and the cylinders. Then it appears to me to be clear that the tank is the cylinder and nothing else. There may well be cases where a tank consists of a structure with a metal lining; in such a case probably the lining would not be capable of use as a tank without the support of the structure. But these cylinders are not mere linings; they would properly have been described as tanks before they were enclosed in the chambers, and enclosure did not alter their character. Taking the ordinary meaning of the word " tank ", I think that these cylinders were tanks originally and are still tanks. They have not acquired additional walls; the sand cannot be part of the tank wall, and I do not think that it would be in accordance with ordinary usage to say that the walls of the chambers became part of the tanks by reason of the tanks being enclosed in the chambers. In my opinion, this appeal should be allowed.

LORD KEITH OF AVONHOLM: My Lords, were it not that there was a difference of opinion in this case, I would have been content to express my entire concurrence with the judgments of the Court of Appeal. As it is I can express my views very briefly.

We are concerned here with four tanks for keeping petroleum spirit below ground in connexion with what is described in the findings of the Lands Tribunal as

> " a wayside petrol filling station of a usual type with a single building for offices, stores and showroom and having a concrete forecourt with three petrol pump islands each accommodating two pumps. These pumps are connected by underground pumps to four three thousand gallon tanks at the side of the building. Each of these tanks which are constructed of metal and were delivered at the site as complete units are cylindrical in shape, thirteen feet six inches in length, seven feet in diameter and weigh when empty about two tons."

It is stated by the Lands Tribunal that it was agreed between the parties that " each of these tanks forms part of the plant installed at the filling station." I mention this fact because it satisfies the first requirement of class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, that the tanks must be part of a plant. In order, however, that the tanks may be rateable as part of the hereditament, it is necessary that the second requirement of class 4 of the schedule be satisfied, that the tanks " are, or are in the nature of, a building or structure."

The method of installation has already been described. It is clear that the pits with their brick and concrete walls, floors and covers were useless except for the purpose of holding the metal containers, as I shall call them for the moment, and the metal containers were useless for their purpose unless placed in the pits or equivalent structures. Now what is said, as I understand it, is that it appears from the licence that was granted under the Petroleum (Consolidation) Act, 1928, by the local authority to store petrol on the premises and from the plans that were submitted to the local authority, that what was meant by " tanks " was the metal containers only and not the containers with their housing. So far as the licence is concerned, no such inference can, in my opinion, be made. The licence says the spirit " shall be kept only below ground in a tank ". The first condition of the schedule of conditions to the licence says:

"The petroleum spirit tank(s) together with the connexion pipes and fittings shall be so constructed and maintained as to prevent any leakage of petroleum spirit."

The sixth condition says: "No alterations shall be made to the tank(s) pump(s) and vent(s) except with the approval of the local authority". This language, in my opinion, leaves it entirely open as to what the local authority understood by a tank. But, from the mere language of condition 6, I should have thought that the local authority would be entitled to object to any alteration of the pit, its structure, or its lay-out as shown in the plans submitted without their approval. In the plans it is true that the appellants described the metal containers as "tank" or "tanks". But all that, in my opinion, is irrelevant. Call them tanks if you will. That is what the Plant and Machinery Order calls them. The question is what becomes of the tank when it is put into the ground. Unless "tank" as used in the order, means only a tank that is constructed in the ground like a small reservoir, clearly there must be some point at which, in some cases at least, a ready made tank brought to the site of premises becomes a tank for rateable purposes within the meaning of the schedule.

In my opinion, when the container here was brought to the site and fitted into a specially prepared pit, with a surround of compacted sand, which, after all, is only a special kind of soil, it became part of a larger unit which can all be described as the tank forming part of the admitted plant of the filling station. The whole is then in the nature of a building or structure. The container is, as LORD EVERSHED, M.R., and PARKER, L.J., described it, just the lining of a tank. It would be an excessive refinement to say that, if a hole was dug in the ground, retained with brick or tiles and lined with metal or some other material and covered over with a cushion of sand between the retaining wall and metal lining, that was a tank for the purposes of the schedule, as I think it must be, but, if the metal lining is brought to the prepared pits as a whole, it is not such a tank. The container here was, in my opinion, just part and parcel of a structure for holding petrol which it was not permissible in the present case to store in any other way.

I agree with the views of the Court of Appeal. The Lands Tribunal, in my opinion, went wrong in thinking that the licence necessarily referred to the container as the tank. In any case, that was, I think, an irrelevant consideration. It also went wrong in thinking that the pit and its structure was just a building housing a piece of plant or machinery like any other building, by which I take the tribunal to include a factory or similar building, in which plant or machinery can be found. Cylinder and housing were, in my opinion, one integral whole.

I would dismiss the appeal.

LORD DENNING: My Lords, in the course of the argument, it was said that this was a matter of degree for the Lands Tribunal to decide. I am glad that your Lordships will not dispose of the case on this facile ground. The primary facts are all agreed. The only question is whether, on those facts, the four petrol tanks fall to be rated as part of the hereditament. That involves in this case a question of law, for the solution of it depends on the true interpretation of the Act of Parliament and the order made thereunder—an order which has not, I believe, come up to this House before. It is, moreover, a test case which will decide, once and for all, the rateability of all the wayside filling stations. If your Lordships were to say: "This is a question of degree for the Lands Tribunal with which we cannot interfere, whatever our own views", you would leave the matter open to be canvassed again before another tribunal. You would leave the position uncertain when it ought to be made certain.

By deciding it here and now, your Lordships will give guidance where it is needed and asked.

My Lords, this metal cylinder was, beyond doubt, a " tank ". If it had been put on to the chassis of a lorry, it would have been called by everyone a petrol tank; and the vehicle would be called a tanker. Or if it had been installed above ground, inside a shed for protection from the weather, it would still have been a tank. When it is put underground, it is still, I think, a tank. But is it " in the nature of a structure "? Looked at by itself, it is, admittedly, not in the nature of a structure. Looked at, as installed on a lorry, or as housed in a shed above ground, it is still not in the nature of a structure. But when it is placed underground in a brick and concrete emplacement, and built into it tight and fast, is it not then " in the nature of a structure "? This depends, of course, on what you mean by " in the nature of a structure ": or rather, on what Parliament meant when it used those words in Sch. 3 to the Rating and Valuation Act, 1925, and what the Plant and Machinery (Valuation for Rating) Order, 1927, meant when it repeated those words.

The Act itself gives some guidance in this respect; for it gives a few instances of what Parliament had in mind. To take illustrations is, I find, often the most helpful way of understanding what an Act of Parliament means: see *Escoigne Properties, Ltd.* v. *Inland Revenue Comrs.* (1). Schedule 3 includes this specific illustration: " Water towers with tanks ". Everyone knows what a " water tower with tank " is. It is a concrete or steel structure built up from the ground with a water tank fitted into the top so that it forms part of one integral whole. If such a tank stood on the ground, it would probably not be rateable as part of the hereditament, because it would not be a structure or in the nature of a structure. But when it is built into a water tower so as to form an integral part of the whole it becomes rateable as part of the hereditament, because it then becomes in the nature of a structure. The water tower itself is clearly a structure; and the tank, being part of it, partakes of the nature of a structure.

Another illustration can be found in a decided case, *B.P. Refinery (Kent), Ltd.* v. *Walker* (2). There was a boiler unit on the premises. It was a very large structure, but, in its essentials it was merely an enlarged version of the common domestic boiler, with its constituent parts, furnace, flues, and so forth, built in together so as to form one integral whole. The boiler unit itself was held not to be rateable because class 4 does not include boilers. But some of the constituent parts, such as the " furnace ", the " economiser ", and the " flues " were held to be rateable, because they were mentioned in class 4. Now if you were to take one of those parts and set it on the ground and look at it separately by itself, it would not be rateable because it would not be in the nature of a structure; but when it was built into the boiler unit so as to become part of the integral whole, it did become rateable because it was in the nature of a structure. It took its colour, so to speak, from the boiler unit of which it formed part. The boiler unit was a structure. So the various parts built into it were in the nature of a structure.

There are, of course, other ways in which parts of a plant may partake of the nature of a structure, as appears from *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.* (3), but the two illustrations which I have given point the way to the decision in this

(1) [1958] 1 All E.R. 406; [1958] A.C. 549.
(2) 121 J.P. 231; [1957] 1 All E.R. 700; [1957] 2 Q.B. 305.
(3) 113 J.P. 78; [1949] 1 All E.R. 27; [1949] K.B. 385.

case. If this petrol tank had stood on the ground, housed in a shed, it would not be rateable as part of the hereditament, because it would not be in the nature of a structure. But the position is altogether different when you find it built into an underground emplacement, embedded in sand, boxed in by girders, encased in a concrete cover—so that no one can get it out except by breaking up the emplacement. The tank is clearly an integral part of the whole, and, as such, partakes of the nature of the whole, just as a tank on a water tower, or a furnace in a boiler. This is a tank which is in the nature of a structure and is, therefore, rateable as part of the hereditament.

The chairman of the Lands Tribunal held otherwise. He asked himself: "Is the whole of the installation a 'functional entity'?" And, finding it was not, he held the tank was not rateable. He took the phrase "functional entity" from the judgment of JENKINS, J., in the *Cardiff* case (1), but I am sure that the learned judge did not mean it to be a test of rateability. A part of plant can be in the nature of a structure without being a functional entity. Each of the various parts in the *B.P. Refinery* case (2), of which I have spoken, such as the furnace, the economiser and the flues, was rateable although none of them was a "functional entity" in itself. I get no help from the phrase and think it should be discarded. By making it the test of rateability, the Lands Tribunal fell into error.

The Court of Appeal reversed the decision of the Lands Tribunal, and held the tank was rateable. They emphasised, just as I would wish to do, the fact that the metal cylinder was built into the brick and concrete structure so as to form one integral whole; and on that account they held it to be rateable as part of the hereditament. I entirely agree with them in the result, but I would use a somewhat different line of reasoning or, perhaps I should say, a somewhat different terminology. LORD EVERSHED, M.R., and PARKER, L.J., seem to have regarded the whole installation as a "tank" which was in the nature of a structure; whereas I think the metal cylinder still remains a "tank", but, by being built into one whole structure, it partakes of the nature of a structure. SELLERS, L.J., used words more in line with my view when he said:

> "The manner of protecting it or lagging it or securing it has turned what was simply a cylinder into a structure or building. I cannot think that in law or in fact it would be sensible or realistic to split the two things up."

I entirely agree with that line of approach.

In the oral argument before your Lordships, counsel for the respondent put his case in the same way as the majority of the Court of Appeal. He said the whole thing was a "tank" just as they did; but in the printed Case he put it also in the way I prefer, saying that, though each cylinder was a "tank", it was, as installed, in the nature of a structure: see reason 3. Is this House bound to determine the case according to the particular way in which counsel puts his argument orally before your Lordships? I think not. Your Lordships are to "determine what of right" ought to be done. To my mind, it is a mistake to fret about this way or that way of putting the case. The decision should not rest on such niceties. Suffice it to take hold of the cardinal fact that this metal cylinder was built into the structure so as to form one integral whole. It is that fact which makes it rateable as part of the hereditament. It is that fact which counsel stressed. The rest is all words and not substance; and

(1) 113 J.P. 78; [1949] 1 All E.R. 27; [1949] 1 K.B. 385.
(2) [1958] 1 All E.R. 406; [1958] A.C. 549.

words are delusive things anyway. It is a matter of indifference whether you call the whole thing a "tank" or only the metal cylinder a "tank", so long as you are agreed that, in either case, it is in the nature of a structure.

The question after all is whether these four petrol tanks fall to be rated as part of the hereditament; and I feel a good deal of confidence in saying that they do, when I find that all three judges in the Court of Appeal think so, and so does my noble and learned friend, LORD KEITH OF AVONHOLM, and, lastly, I myself do too. I would, therefore, dismiss this appeal.

Appeal allowed.

Solicitors: *Sydney Morse & Co.*; *Solicitor of Inland Revenue.*

G.F.L.B.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., CASSELS AND BARRY, JJ.)

December 1, 2, 1958

R. *v.* CHANDOR

Criminal Law—Evidence—Admissibility of similar offences—Series of alleged indecent offences against children—How far series may be regarded in determining truth of one incident—Association between schoolmaster and pupil.

The passage in the judgment in *R.* v. *Campbell*, (1956), 120 J.P. 359, at p. 362, which states that in cases of alleged sexual assaults on a number of children where the evidence on each child deals only with the assault on himself or herself, "a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story", is not of universal application. Evidence of a succession of incidents may be admissible to help to determine the truth of the evidence of any one incident for the purpose of proving identity, intent, or guilty knowledge, or to rebut a defence of innocent association, but such evidence cannot be admissible where the defence is that the meeting or occasion for an incident in question never took place at all.

SEMBLE: with regard to the defence of innocent association, in the case of a schoolmaster and his pupil there may be nothing in the association which calls for any explanation.

R. v. *Campbell* (supra) explained.

APPEAL against conviction.

The appellant was convicted at Croydon Quarter Sessions on Oct. 18, 1958, on five charges of indecent assault on boys and was sentenced to concurrent terms of six months' imprisonment.

The appellant, a man of 29 of excellent character, was a schoolmaster at a secondary boys' school. The alleged offences, which involved three different boys between the ages of 13 and 15, were committed at various dates between May, 1956, and June, 1958. The appellant's case was that none of the alleged incidents ever took place. In one case he denied that he had ever met the boy at the place where the boy said the offence was committed; in the other cases he agreed that he was in the company of the boys at the material time and place, but he denied that there had been any kind of indecency or anything which might have been misconstrued as indecency.

McKinnon, Q.C., and *D. A. Hollis* for the appellant.

MacManus for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant is a man of twenty-nine years of age and of excellent character. He was a schoolmaster at a secondary boys' school at Croydon, and the alleged offences took place on five occasions between May, 1956, and June, 1958, on three different boys aged thirteen to fifteen years. His defence from the outset and at the trial was that the alleged incidents never took place at all and that the boys' stories were merely products of their imagination. It is clear, therefore, from what I have said, that a most careful direction was needed as to the admissibility of evidence of other incidents in determining the truth of any one incident.

In the course of his summing-up the learned recorder pointed out that there was, as indeed was right, no corroboration at all in this case and he gave the jury the usual warning. He continued in these terms:

> " Where there is a series of these incidents deposed to by witnesses of this kind, where you are told that a succession of these incidents happened, it may help you to determine the truth of the matter, provided that you are satisfied that there is no collaboration between the children to put up a false story. That is what the Court of Criminal Appeal has laid down in 1956 as a proper direction to give to a jury. You are entitled to take into account what Smith and Whibley have said in considering the evidence of Edwards, not as corroboration of what Edwards has said, because if there are a series of these incidents you may probably take the fact that there have been other incidents deposed to to help you to dispose satisfactorily of the issue, provided you are satisfied there has not been any collaboration between the children to put up a false story . . . I should also tell you there is another phase of the present case which you are entitled to take into account in dealing with any one incident; for example, in one of the assaults deposed to by Edwards you are entitled to take the evidence of the other witnesses into account, and that is in relation to any case where it can be said that the real defence was not ' I was not there; I never was anywhere near the place ', but that this was a perfectly innocent meeting with the boy; you are entitled to take that into account to see whether that rebuts the defence of innocent behaviour."

Those two passages in the summing-up were undoubtedly based on a passage in the judgment of the court in *R.* v. *Campbell* (1). That was a case dealing only with questions of corroboration, but at the end of the judgment LORD GODDARD, C.J., added this:

> " As we are endeavouring in this judgment to deal comprehensively with the evidence of children we may perhaps endeavour to give some guidance to courts who have from time to time to deal with cases of sexual assaults on children where the evidence of each child deals only with the assault on him or her self. In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B says that he also was the victim of a similar assault though both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, the case of *R.* v. *Sims* (2), subsequently approved

(1) 120 J.P. 359; [1956] 2 All E.R. 272; [1956] 2 Q.B. 432.
(2) [1946] 1 All E.R. 697; [1946] K.B. 531.

on this point by the House of Lords in *Harris* v. *Public Prosecutions Director* (1), shows that such evidence can be given to rebut the defence."

Now the first part of that passage before the reference to a defence of innocent association is in very general terms. Unqualified, it would appear to cover a case where the accused was saying that the incident in question never took place at all. To take an incident in the present case, the appellant said that in respect of an alleged offence with a boy—I think it was Edwards at View Point—he had never met the boy at View Point at all. Yet, if this passage in *R.* v. *Campbell* (2) is unqualified, it would apply to just such a case. We do not think that the passage in *R.* v. *Campbell* (2) was ever intended to cover that. Indeed, so far as we know the authorities have never gone so far as that, nor do we see how they could. Evidence that an offence was committed by the accused against B at Croydon could not be any evidence that the accused met A in the Lake District and committed an offence there. There are, of course, many cases in which evidence of a succession of incidents may properly be admissible to help to determine the truth of any one incident, for instance, to provide identity, intent, guilty knowledge or to rebut a defence of innocent association. On such issues evidence of a succession of incidents may be very relevant, but we cannot say that they have any relevance to determine whether a particular meeting or occasion for an incident ever occurred at all.

That really is sufficient to dispose of this case, and it is unnecessary to deal with the second passage in the summing-up in respect of a defence of innocent association. We would only observe that in the case of a schoolmaster and his pupil there may be nothing suspicious in the association which calls for explanation. However, having regard to the view we have taken as to the passage in *R.* v. *Campbell* (2) and the summing-up based thereon it is unnecessary to deal with that. It follows that the conviction must be quashed and the appeal allowed.

Appeal allowed.

Solicitors: *Wilders & Sorrell*; *Director of Public Prosecutions.*

T.R.F.B.

(1) 116 J.P. 248; [1952] 1 All E.R. 1044; [1952] A.C. 694.
(2) 120 J.P. 359; [1956] 2 All E.R. 272; [1956] 2 Q.B. 432.

CONWAY GENERAL LAW LIBRARY 1959

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND ASHWORTH, JJ.)

January 27, 28, 1959

FINE FARE LTD. *v.* BRIGHTON COUNTY BOROUGH COUNCIL

Shop—Early closing—Mixed shop—Trade of many classes—Closing order made by local authority for different days for different trades—Applicability of orders to mixed shop—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *s.* 1 (2).

The appellants were the occupiers of a mixed shop in which several retail businesses were carried on, the main businesses being those of grocers, greengrocers, fishmongers and butchers. They closed their premises at 1 p.m. on Thursdays for the weekly half holiday. The local authority had made orders under s. 1 (2) of the Shops Act, 1950, providing that Wednesday should be early closing day for grocers, greengrocers, fishmongers and butchers, but had made other orders appointing Thursday as early closing day for other businesses which the appellants also carried on on the premises. No order had been made fixing an early closing day for a shop where several different businesses were carried on. The appellants were convicted at a magistrates' court of four offences (one in respect of each of the aforementioned principal businesses) by not closing early on Wednesday.

HELD: that the orders made by the local authority did not apply to a mixed shop where several different businesses were carried on, and, as the appellants' premises were a single shop and not several shops, the convictions must be quashed.

Patrick Thompson, Ltd. v. *Somerville*, 1917. S.C. (J.) 3, and *MacDonald* v. *Groundland*, 1923. S.C. (J.) 28, applied.

Per LORD PARKER, C.J.: Where there is a single hereditament consisting of self-contained premises laid out with counters, the whole of those premises constitutes the shop.

CASE STATED by justices for the county borough of Brighton.

Four informations were preferred on behalf of the respondents, the council of the county borough of Brighton, against the appellants, Fine-Fare, Ltd., the first alleging that the appellants being the occupiers of a shop situate at 166/168, Western Road, Brighton, wherein the retail trade or business of a grocer, tea dealer and provision merchant was carried on, unlawfully did fail to close such shop for the serving of customers not later than one o'clock in the afternoon of Wednesday, Mar. 12, 1958, contrary to s. 1 of the Shops Act, 1950, and the Brighton Weekly Half Holiday (No. 2) Order, 1912. Three other informations were preferred on behalf of the respondents against the appellants. These were in identical words save that they referred to the appellants' trade or business as that of fruiterer, greengrocer and florist, or fishmonger and poulterer, or butcher, and referred to breach of weekly half-holiday orders made in 1918, 1921 and 1922.

The informations were heard together at Brighton magistrates' court on May 5, 1958, when the following facts were found. On Mar. 12, 1958, and at all material times the appellants were the occupiers of premises at 166/168, Western Road, Brighton, which premises were assessed for rating purposes as a single hereditament. In the premises at all material times the appellants carried on the retail trades or businesses of (a) a grocer, tea dealer and provision merchant; (b) a fruiterer, greengrocer and florist; (c) a fishmonger and poulterer; and (d) a butcher. In addition at all material times they carried on (but to a much smaller extent) other retail trades or businesses including that of: (i) a domestic hardware merchant; (ii) a stationer; (iii) a confectioner; (iv) a baker; (v) a tobacconist; and (vi) a seedsman. On Nov. 1, 1912, Dec. 19, 1918, Mar. 17, 1921, and May 22, 1922, the respondents made weekly half-holiday orders, providing that every shop within the borough in which the trades or businesses (a) to (d) were carried on should be closed on Wednesday at 1.0 p.m., provided that the occupier of any

shop, might at his option, close on Saturday, at 1.0 p.m. instead of Wednesday, on affixing in some conspicuous place in such shop a notice to that effect. Each of the orders was in force at all material times and was applicable to the appellants' premises, but no notice that the appellants substituted Saturday for Wednesday was affixed in the premises of the appellants and the premises were opened for serving customers after 1.0 p.m. on Saturday, Mar. 15, 1958. The respondents on various dates had made other orders relating to (i) the days of the week on which shops wherein certain retail trades or businesses are carried on either generally or in certain areas should be closed at 1.0 p.m.; (ii) the periods of the year during which shops as above should be exempt from the obligation to close at 1.0 p.m. on one day in each week; (iii) the exemption of shops where certain retail trades or businesses were carried on from the provisions of s. 1 of the Shops Act, 1950; (iv) the extension of the provisions of s. 1 to certain trades or businesses exempted therefrom by the provisions of sub-s. (6) of s. 1; (v) Sunday closing. The retail trades or businesses carried on in the appellants' premises fell into four groups: (1) those specified in orders providing for the closing of shops wherein they were carried on on Wednesday; (2) those specified in orders providing for closing of shops where they were carried on on Thursday; (3) those not specified in any order providing for weekly half-holiday closing and neither of a class mentioned in Sch. 1 to the Shops Act, 1950, nor specified in any order exempting the same from the provisions of s. 1 of the Act; (4) those of a class mentioned in Sch. 1 to the Act of 1950 or the subject of orders exempting shops so far as they were used for carrying on the same from the provisions of s. 1. On Wednesday, Mar. 12, 1958, whilst occupying the premises the appellants did not close the premises or any part of them for the serving of customers at or before 1.0 p.m. and after 1.0 p.m. all the retail trades or businesses habitually carried on in the premises were being carried on. The appellants habitually closed the whole of the premises not later than 1.0 p.m. on Thursday, throughout the year, as specified in a notice to that effect affixed in the premises. The respondents had made no order specifically relating to mixed shops.

For the appellants it was contended that they were the occupiers of one set of premises wherein there was one shop and that they fulfilled their obligation under s. 1 (1) of the Shops Act, 1950, to close the shop at or before 1.0 p.m. on one week day throughout the year by closing the whole shop at or before 1.0 p.m. on Thursday throughout the year. That they were under no obligation to close one part of the shop at 1.0 p.m. on one day throughout the year and other parts at 1.0 p.m. on another or other days; and that if they did so they would not thereby fulfil the obligation imposed by s. 1 (1) of the Shops Act, 1950. That if the appellants were obliged to close the whole shop on one day to fulfil the requirements of s. 1 (1) of the Shops Act, 1950, and in addition to close part of the shop on another or other day so as not to infringe any order of the respondents made under the Act, an obligation was imposed on them which was greater than that which was imposed by the Act on shopkeepers. That if on the proper construction of the orders of the respondents a part of the shop had to be closed at or before 1.0 p.m. on one day and other parts had to be closed on another or other days, or alternatively if the whole shop was required to be closed on one day and a part or parts on another or other days, the orders were ultra vires the Shops Act, 1950. That in the absence of an order relating to mixed shops the appellants were at liberty to choose on which week day throughout the year the shop would close at or before 1.0 p.m. by affixing a notice specifying the closing day in the shop. That none of the orders referred to applied to the appellants' shop. That the appellants' premises were not a grocer, tea dealer and provision merchants' shop; nor a fruiterer, greengrocer and florist's shop;

nor a fishmonger and poulterer's shop nor a butcher's shop within the meaning of the respective Brighton Weekly Half-Holiday Orders.

On behalf of the respondents it was contended that in the appellants' premises there was more than one shop within the meaning of the Shops Act, 1950, and those parts of the premises wherein the appellants carried on the retail trades or businesses of (i) a grocer, tea dealer, and provision merchant, (ii) a fruiterer, greengrocer and florist, (iii) a fishmonger and poulterer, and (iv) a butcher, comprised four separate shops. That, accordingly, the respondents were obliged to close for the serving of customers these parts of the premises wherein such trades or businesses were carried on at 1.0 p.m. on Wednesday; and, having failed to do so, they were guilty of each of the offences charged. Alternatively, that if in the appellants' premises there was only one shop, then the four retail trades or businesses referred to above were such that the appellants were obliged to close on Wednesday at 1.0 p.m. under one of the orders. As regards the parts where they sold bread, delicatessen, cakes, milk, cigarettes, sweets, ices, and toilet requisites they were exempt from the obligation to close on one day each week at 1.0 p.m. As regards the parts where they sold stockings, towels, tablecloths, shirts, ties, sheets and hardwear, the retail trades or businesses were not sufficiently extensive to consist in the carrying on of separate retail trades or businesses but were merely incidental to one or other of the above four trades or businesses; and accordingly the appellants were obliged to close the whole of the premises, except the parts which were exempt, for the serving of customers at 1.0 p.m. on Wednesdays and, having failed to do so, were guilty of all or one of the offences charged. That, in the further alternative if in the appellants' premises there was only one shop and if in the parts where they sold stockings, etc., separate retail trades or businesses were carried on, then the appellants were obliged pursuant to the order to close for the serving of customers those parts where the four above trades or businesses were carried on at 1.0 p.m. on Wednesdays. That the orders were intra vires the Shops Act, 1950.

On the findings of fact the justices were of the opinion that the appellants were guilty of the offences charged, and, accordingly, they were convicted of each offence. The appellants appealed and the question for the opinion of the court was whether the justices came to a correct determination and decision in point of law.

Scarman, Q.C., and *Stable* for the appellants.
R. J. Parker for the respondents.

LORD PARKER, C.J.: The appellants occupy premises in Western Road, Brighton, which are self-contained and for rating purposes are a single hereditament. In those premises they carry on a mixed business. Their main business is fourfold, namely, (1) that of a grocer, tea dealer and provision merchant, (2) that of a fruiterer, greengrocer and florist, (3) that of a fishmonger and poulterer, and (4) that of a butcher. In addition, though on a smaller scale, they carry on other trades or businesses including those of a domestic hardware merchant, a stationer, a confectioner, a baker, a tobacconist and a seedsman.

The Shops Act, 1950, which is an amending and consolidating Act, provides by s. 1 (1):

> "Every shop shall be closed for the serving of customers not later than one o'clock in the afternoon on one week day in every week."

The appellants have obeyed that injunction in that they have closed the whole of these premises on Thursday afternoon of every week. The Act then provides by s. 1 (2):

> " The local authority may, by order, fix the day on which a shop is to be so closed (in this Act referred to as ' the weekly half-holiday '), and any such order may either fix the same day for all shops, or may fix—(a) different days for different classes of shops . . . "

The local authority, the council of the county borough of Brighton, have made a number of orders which have been in existence now for a considerable time, some were made in 1912, 1921 and 1922. They were made under the Shops Act, 1912, but by s. 76 of the Shops Act, 1950, they remain in force as if made under the present Act. They provide that in regard to shops wherein the retail trade or business of a grocer, tea dealer and provision merchant is carried on the shop shall be closed on Wednesday, not Thursday, and the order for a fruiterer, greengrocer and florist also provides for a Wednesday closing; so does that in respect of shops wherein the trade or business of fishmonger and poulterer is carried on, and also that in respect of the trade of butcher. In regard to yet another order dealing with towels, tablecloths, sheets and the like, there was a provision for Thursday closing. Accordingly, the four informations in this case charged the appellants with failing to comply with the four orders that I have referred to which provided for a Wednesday closing.

I have very great sympathy with the justices who were called on to decide this case. I also have very great sympathy with any shopkeeper who has occasion to consider the Shops Act, 1950. Section 1 is extraordinarily difficult to construe. I will not go into it in detail, but clearly the first question is: What is a shop? One gets no assistance from the definition, which merely provides that it includes any premises wherein retail trade or business is carried on. Does " shop " there mean the physical self-contained premises? Can it be construed as applying to a department within those self-contained premises or, indeed, to a counter in a department? It seems to me that, reading the Act as a whole and the regulations, the term " shop " refers to the premises, and, although there is no specific finding in this case, I think that it is perfectly clear that where there is a single hereditament consisting of self-contained premises laid out with counters (as is shown on the plan of these premises) the whole of those premises constitutes the shop; it is impossible to say that any particular part of those premises or any particular counter constitutes the shop. Accordingly, prima facie each one of these orders, which apply to shops wherein the specified trade or business is carried on, applies to the premises, and the Shops Act, 1950, provides that every shop for which a day has been fixed shall be so closed, that is, closed for the serving of customers.

The argument for the appellants who have been convicted in this case, quite shortly, is that on those plain words it becomes their duty, if these orders apply to them, to close the whole of the shop on every day on which an order requires closing. In this case the four orders applied to a Wednesday and another order to a Thursday, and that would mean they would be obliged to close the whole of their shop every Wednesday and the whole of their shop every Thursday. As counsel for the appellants pointed out, a local authority might make orders which would cover almost every day of the week. Accordingly, he says that that construction reduces the whole matter to an absurdity. I should say that a shopkeeper always has the option, whatever the local authority think, to close on Saturday instead of on the specified day. Therefore, the appellants would have to opt to close on Saturday instead of closing on Wednesday and Thursday, but that does not lessen the absurdity, because the option is no longer a free option, but in practice the appellants would have to close their shop on Saturday. On the other side, counsel for the respondents has urged, very plausibly, that if you read the Act as a whole it becomes clear that you are

really only fixing a day for the closing of a shop in relation to a particular trade being carried on. He points to a number of other parts of the Act which clearly contemplate that the whole of the shop will not be closed but only certain counters or departments within the shop. From that he urges that the true construction of s. 1, and the only construction which will really make sense, is that if, for instance, an order provides for the Wednesday closing of a shop wherein a butcher's trade is carried on, then, in the case of these appellants, they would have to close that part of their counters where they ordinarily sell butcher's meat. I confess that for my part I have very grave doubts. I bear in mind that the provisions are penal provisions. I also bear in mind that unless the argument of counsel for the respondents is right there may be unfairness and competition between traders, which is clearly a matter to be taken into consideration under this Act; but I am still left in very considerable doubt if only for the reason that there is no irresistible inference towards that construction. That construction is merely the one which ought to be given to the enactment in order to produce a logical scheme. There is a difference between saying what would be a logical scheme and saying what the scheme is which Parliament has intended and which must be applied. I find it unnecessary to come to any conclusion in the matter for the reason that, as long ago as 1916, this point came before the Scottish courts. It arose under the Shops Act, 1912, but for all material purposes the wording is the same. In *Patrick Thomson, Ltd.* v. *Somerville* (1) a large firm of retail drapers and general warehousemen carried on in single premises their business as such together with a hairdressing business. The hairdressing business was ancillary to their main business and formed only a small part of their business. The local authority made an order that hairdressing shops were to be closed on a particular day and that was challenged by the shopkeeper. The court held unanimously that the order applying to a shop wherein the business of hairdressing was carried out did not apply at all to the case of a mixed business where other businesses were carried on as well as hairdressing; in other words it only applied to premises where the sole business was hairdressing. The Lord Justice-General (LORD STRATHCLYDE) said this:

> "I think, from the description of the business which they carry on, that the appellants fall within the description given in s. 10 (1) of the [Shops Act, 1912], viz., persons who are carrying on in the same shop several trades or businesses; and under s. 4 (2) [of the Act of 1912] the local authority might have provided for the half-holiday being observed on a particular day in shops where a number of different trades or businesses are carried on. The local authority has not, however, thought fit to do so. The order in question is applied, apparently, to all barbers' and hairdressers' shops, and that may be quite legitimate; but it appears to me that it does not apply to a case like the present where the shop is in the occupancy of one person who carries on therein a variety of different trades or businesses. In such a state of matters the statute expressly authorises the occupant of the shop to go on with any one of his businesses, which chances to be one of the exempted businesses, but quoad all the rest the weekly half-holiday prescribed by the local authority must be observed."

Then he deals with the provisions of the particular order, and he ends in this way:

> "On the ground, therefore, that the appellants occupy only one shop in which a variety of trades and businesses is carried on, I hold that the order in question does not apply to the present case, and accordingly that we ought to answer the question put to us in the negative."

(1) 1917. S.C. (J.) 3.

The other two judgments given in *Patrick Thomson, Ltd.* v. *Somerville* (1) were to the same effect. That was in 1916, and it is true that in that case there was a finding that the hairdressing business was merely ancillary to the other business. In 1922, however, *MacDonald* v. *Groundland* (2) came before the courts in Scotland. There the business carried on was that of a jewellers and tobacconist's business in the front of the shop, but at the back there was a hairdresser's business, and it is clear in that case that the hairdresser's business was a substantial part of the whole and not merely subsidiary. Again there was an order fixing a day, in that case Thursday or Saturday, as the weekly half-holiday for hairdressers' shops. The argument was that in that case by reason of the substantial character of the hairdresser's business it could be distinguished from *Patrick Thomson, Ltd.* v. *Somerville* (1), but the Lord Justice-Clerk (LORD ALNESS) said this:

> " Having given careful attention both to the argument and to the decision in *Patrick Thomson's* case (1), I am quite unable to see that any radical distinction, either in fact or in law, can be drawn between it and the case with which we are now concerned. The only distinction in fact which has been suggested is that, whereas we are here dealing with a business which forms a substantial part of small premises, the court was there concerned with a business which formed a small part of large premises. That is a perfectly accurate distinction in fact; but I am unable to see that it affected the judgment which was pronounced in *Patrick Thomson's* case (1)."

There are two cases, therefore, in the Scottish courts, one in 1916 and one in 1922, saying that in cases such as this the order does not apply, and although those decisions are in no way binding on this court, this court does try to decide in the same way, as LORD GODDARD, C.J., said quite recently in *Trickers (Confectioners), Ltd.* v. *Barnes* (3):

> " In any case, if there is a decision of the High Court of Justiciary which deals with these matters on the other side of the Border, we in this court always try to decide in the same way."

What LORD GODDARD, C.J., there said applies with force in the present case. There were these decisions in 1916 and 1922, since when Parliament has considered the whole matter, and Parliament has enacted the present Act of 1950. Unless this court could come to a clear conclusion that the decisions in Scotland were wrong, they should, in those circumstances, be followed. On that ground, and on that short ground, I would allow this appeal.

DONOVAN, J.: Speaking solely for myself, I would have come to a conclusion in the appellants' favour even in the absence of the Scottish decisions, but in the circumstances there is no point in my giving detailed reasons. Broadly they are those put forward on behalf of the appellants, but the decision of this court in this case is presumably final and I do not want to run the risk of creating fresh difficulties on this dark subject by observations of my own; I content myself, therefore, by agreeing that this appeal should be allowed for the reasons, among others, stated by the Lord Chief Justice.

ASHWORTH, J.: I agree with the judgment of the Lord Chief Justice.

Appeal allowed.

Solicitors: *Royds, Rawstorne & Co.; Sharpe, Pritchard & Co.*, for *Town Clerk*, Brighton.

T.R.F.B.

(1) 1917. S.C. (J.) 3.
(2) 1923. S.C. (J.) 28.
(3) [1955] 1 All E.R. 803.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., DONOVAN AND ASHWORTH, JJ.)

February 2, 1959

R. *v.* CLUCAS. R. *v.* O'ROURKE

Criminal Law—Wagering fraud—Betting transactions with bookmaker—Transactions fraudulent from outset—False representations with regard to identity—Intention not to pay losses—Gaming Act, 1845 (8 & 9 *Vict.*, c. 109), *s.* 17.

The appellants visited various places in Hampshire and Dorset. One of them would ring up a local bookmaker, giving a false name and pretending that he was a foreman or a person engaged on a works contract. He would then ask the bookmaker to accept him under the assumed name as his client for the purpose of placing bets on behalf of workmen. When the bookmaker did this, and the bet proved to be a winning bet, one or other of the appellants collected the winnings. On two occasions one of the appellants did pay small losing bets, but on all other occasions when the bet proved to be a losing bet, or when the bookmaker made further enquiries, or asked for payment on losses, the appellants moved on to some other place.

HELD: that the appellants were rightly convicted of fraud in wagering, contrary to s. 17 of the Gaming Act, 1845, as at the time of the making of the bets they intended to accept the money if they won, but not to pay if they lost any substantial sum, and were, therefore, fraudulent from the outset; and that it was not necessary, to constitute this offence, that the money should have been won through some fraud in the race itself.

R. v. *Leon*, (1944), 109 J.P. 58, applied.

APPEALS against conviction, and in the case of the appellant Clucas also against sentence.

The appellants, Baden Geoffrey Clucas and George Peter O'Rourke, were indicted at Hampshire Assizes, on Sept. 23, 1958, on an indictment containing nine counts. The first six counts charged them both with obtaining money by fraud in wagering on the events of horse races, contrary to s. 17 of the Gaming Act, 1845. The particulars of the first count were that on a day between June 2 and June 6, 1958, in Hampshire, by fraud in wagering on the events of horse races, the appellants won and obtained the sum of £27 19s. 7d. from Leslie Charles Eustace, a bookmaker, by a false pretence. The particulars of the second, third, fourth, fifth and sixth counts related to other sums alleged to have been similarly obtained from other bookmakers in Hampshire and in Dorset. The seventh count charged a similar offence against Clucas alone. The eighth count charged both appellants with conspiracy to defraud, the particulars being that on divers days between June 2 and Aug. 2, 1958, in Hampshire, they conspired together and with other persons unknown to defraud such bookmakers as should thereafter be induced to bet with them by false representations that they were placing small bets on behalf of a number of persons and that, therefore, credit for substantial sums could be given safely by such bookmakers, whereas in fact they intended to make, and did make, large bets on behalf of themselves alone. The ninth count charged both appellants with a similar offence, in Dorset, on divers days between July 28 and Aug. 2, 1958.

On Sept. 24, 1958, the appellant Clucas was convicted on all counts and the appellant O'Rourke was convicted on all the counts against him excepting count 2. Clucas was sentenced to seven years' preventive detention, and O'Rourke was sentenced to two years' imprisonment.

I. S. Hill for the appellant Clucas.
N. R. Blaker for the appellant O'Rourke.
Michael Lee for the Crown.

LORD PARKER, C.J., delivered this judgment of the court. The appellants were tried at Hampshire Quarter Sessions on seven substantive offences of fraud in wagering contrary to s. 17 of the Gaming Act, 1845, and also on two charges of conspiracy to defraud bookmakers. The reason why there were two alleged conspiracies was that one course of conduct concerned Hampshire and another course of conduct concerned Dorset. As regards the seven substantive offences, both appellants were charged jointly on six of them and Clucas on the seventh.

What happened in this case was that Clucas and, as the jury found, O'Rourke set about defrauding bookmakers. There is no doubt that Clucas, at any rate, is a complete menace, as his convictions show. Their scheme was this: they would go to some place—they started at Aldershot—and one or other of them would ring up the local bookmaker, giving a false name and pretending that he was a foreman, or at any rate engaged on some works contract, and that the men on the site wanted to place bets, and he would ask whether the bookmaker would accept him, under the assumed name, as his client for the purpose of placing bets on behalf of workmen. It is also quite clear that in all cases the appellants never intended to pay losses, if the losses were of any substantial amount. I say that because O'Rourke did pay two small losses. Generally, however, when they won they collected their bets, and when they lost they moved on to the next place. Having exhausted Hampshire they went and did the same thing in Dorset. As soon as a bookmaker asked for the payment of losses or asked for a deposit or made further inquiries, they moved on, and it was not until fairly late in the day that the police were brought in and laid a trap, and the appellants were finally caught.

The main point in this appeal taken by both the appellants is that, whatever anybody may think of their conduct and whether it is criminal or not, it does not come within the words of s. 17 of the Gaming Act, 1845, as charged. They were charged

> ". . . with obtaining money by fraud in wagering on the events of horse races, contrary to s. 17 of the Gaming Act, 1845 . . ."

Section 17, so far as relevant, is in these words:

> " Every person who shall, by any fraud . . . in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence . . ."

It is said that it is necessary in any charge under this section to show that money has been won by fraud as opposed to obtained by a fraud. The winning, it is said, must have been through some fraud in the play, the gamble or the sport, whatever it may be. If I may give an example, it is said that fraud in inducing bookmakers to accept bets, as in the present case, by pretending that one is acting for other people, acting in a false name, and with no intention of paying losses, is not a fraud in wagering, because there must be some fraud in the race itself. It is clear that that is a view which has been taken by certain of the text-books, in particular RUSSELL ON CRIME (11th ed.), pp. 1373-1376. At p. 1376 the author quotes the vital words of the section as being these:

> " Every person who shall, by any fraud, or unlawful device or ill practice . . . win from any other person to himself . . . any sum of money . . ."

I venture to think that those are not all the vital words because what is omitted from that quotation is the fraud which is laid down in the section, namely, either a fraud in playing at the game in question or

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Eng Rep

". . . in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering . . ."

It is perfectly true that the money is won by the horse winning, but it was held by this court in *R.* v. *Leon* (1) that, although that is true, it is enough to justify a person being found guilty under this section that there was fraud in the actual wagering. In *R.* v. *Leon* (1) the facts were much the same as those in the present case. The fraud there consisted of a representation to the bookmakers that the accused had means enough to pay losses of £500 a week. That was a representation which was made dishonestly in order to persuade the bookmaker to accept the bets. OLIVER, J., a judge of very great experience in criminal matters, summed up to the jury in these words:

"Do you regard that as money that he had won by cheating in the circumstances of this case? Before you come to that conclusion, it seems to me you would have to come to the conclusion that you are satisfied upon the evidence . . . that when he entered into those three sets of transactions he never intended to pay if he lost; that he intended to put the money in his pocket if he won, but he never intended to pay if he lost."

There was an appeal to this court, and the decision of the court was given by SINGLETON, J. He referred to s. 17 and, having quoted the relevant words of the section, he said:

"It is to be observed that something more than what is commonly known as obtaining money by false pretences is contemplated by the legislature."

Then, having referred to certain facts, he went on:

"The difficulty is to see what 'in wagering' means. For the purposes of this appeal it must be taken that the jury, who had this case before them for some time, were all satisfied that the appellant was fraudulent throughout. Counsel for the appellant cited to us authorities under this section which were all dealing with games of cards. They were *R.* v. *Brixton Prison (Governor), Ex p. Sjoland & Metzler* (2) and *R.* v. *Moore* (3). In those cases it was said that in a game of cards or a game such as a three card trick it was not sufficient to show that there was fraud before the game started, but there must be shown fraud in the course of the game itself. Of course, a game of cards is not quite the same thing as wagering. The act of making a wager is done by a word or a few words, an offer, and an acceptance. Counsel for the respondent submitted that unless in the circumstances of this case the offence of fraud in wagering was committed, it was difficult to see when it could be, and, as he remarked, wagering is instantaneous, and he submitted that the circumstances of this case showed that there was evidence on which it was open to the jury to find fraud in wagering."

SINGLETON, J., then quoted the words of the summing-up and went on to say:

"The real question which was put to the jury was: Was the appellant fraudulent throughout, and they said: Yes, he was. That seems to us to mean, and necessarily to mean, that at the time that the appellant made each of these bets with the bookmaker, he intended to cheat; he was fraudulent and at the moment of making the bet, he intended to cheat and defraud the bookmaker."

That was a decision of this court, and, if any members of the court felt that there was any doubt with regard to the conclusion arrived at and the law laid down in

(1) 109 J.P. 58; [1945] 1 All E.R. 14; [1945] K.B. 136.
(2) 77 J.P. 23; [1912] 3 K.B. 568.
(3) (1914), 10 Cr. App. Rep. 54.

that case, the court would adjourn and have a court of five to consider the matter, because this court will depart from one of its own decisions only if it is clear that some wrong principle has been laid down. The court, however, has no reason to think that *R.* v. *Leon* (1) was wrongly decided.

In the present case it is abundantly clear, if one looks at the moment when these bets were placed, that the appellants were fraudulently representing and continuing the representation that they were acting for a number of men, thus inducing the bookmakers to accept their bets without further inquiry. It is also clear that, at the time when they placed their bets, they had no intention of paying losses. That being so, there was clearly a fraud in wagering within the principle laid down in *R.* v. *Leon* (1), and the appeal on that ground must fail.

Counsel for O'Rourke took a number of other points. In particular, he maintained that O'Rourke had been prejudiced by a ruling admittedly given, but at a very late stage, in regard to a statement by Clucas. Clucas had made a statement to the police in which he said that he and O'Rourke were acting together in this matter. No ruling was obtained as to the admissibility of that evidence against O'Rourke until after the evidence had been given. No doubt that was because the deputy chairman was not asked to rule on it earlier. When he was asked to do so, he did rule in the presence of the jury that the statement of Clucas was not, in any sense of the word, evidence against O'Rourke. There followed the speeches of counsel, and in his summing-up the deputy chairman said:

> "You have heard a great deal of discussion in the course of this case about the statement that Clucas made, which has been proved by the police officer. You heard me rule this morning that that statement is no evidence of conspiracy against O'Rourke; it is only evidence against Clucas. On the other hand, you have also heard me rule that, in my judgment, there is ample evidence for you to consider quite apart from that statement—which you will put out of your minds when you consider the case against O'Rourke—on the conspiracy, and it will be for you to weigh that evidence, the whole of it, and consider Aye or No, does it point irresistibly to one conclusion only."

There was thus a clear ruling and a direction to the jury that the statement of Clucas had to be put out of their minds completely when they were considering the case of conspiracy against O'Rourke. They were, however, left, in the opinion of this court, with abundant evidence on which they could hold O'Rourke a party to the conspiracy. Counsel for O'Rourke pointed out that the pattern of operation of the two appellants was slightly different, but here were two men, living and working together, each apparently found with lists of the other's bets, and, broadly speaking, the pattern was the same. In the opinion of this court there was ample evidence on which the jury could convict O'Rourke of conspiracy. For these reasons the court feels that there is nothing in this case and that, as regards conviction, the appeals fail.

The first appellant, Clucas, also appeals against sentence. He was sentenced to seven years' preventive detention concurrent on each count. He is a man of forty-eight. In 1949 he was sentenced to twelve months' imprisonment for conspiracy, in 1950 to two years for attempted false pretences and conspiracy, in 1953 to three years for attempted false pretences, and in 1957, in Scotland, to six months for attempted fraud. As has been said before, this man is a menace to bookmakers and the court can see no reason to interfere with the sentence. Accordingly, the appeal against sentence is also dismissed. *Appeals dismissed.*

Solicitors: *Registrar, Court of Criminal Appeal; Bradley Trimmer & Son*, Alton.

T.R.F.B.

(1) 109 J.P. 58; [1945] 1 All E.R. 14; [1945] K.B. 136.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND ASHWORTH, JJ.)

February 3, 1959

DIXON *v.* B.R.S. (PICKFORDS), LTD.

Road Traffic—Motor vehicle—Overall width exceeding 9 ft. 6 in.—Three persons not in attendance—Steel cylinder mounted on bogies—Bogies attached at front to one tractor and at back to another—Whether combination one vehicle—Motor Vehicles (Authorisation of Special Types) General Order, 1955 (S.I. 1955, No. 1038), reg. 18 (1).

The respondents were charged on two informations, each alleging the use of a motor vehicle the overall width of which with its load exceeded 9ft. 6in. without at least three persons being in attendance while it was being driven, contrary to reg. 18 of the Motor Vehicles (Authorisation and Special Types) General Order, 1955. A large steel cylinder which was over 9ft. 6in. in diameter was moved by the respondents by means of two tractors. The cylinder itself was mounted at each end on bogies, the bogies in turn being attached at the forward end to one tractor and at the rear end to another tractor. By that means one tractor would pull the bogies and the cylinder, while the tractor at the back would merely guide it round corners. The magistrate held that this combination of vehicles was, in effect, one vehicle within the regulation, and that, since there were two drivers and two attendants, the respondents were guilty of no offence under reg. 18. He, accordingly, dismissed the information. On appeal by the prosecutor,

HELD: that the word "vehicle" in reg. 18 did not include a combination of vehicles, nor did the singular "vehicle" include the plural, and, therefore, the case must be remitted to the magistrate to hear and determine with the direction that his construction of the regulation was wrong.

CASE STATED by stipendiary magistrate for the city of Leeds before whom the respondents were charged with two offences contrary to the Motor Vehicles (Authorisation of Special Types) General Order, 1955.

On June 17, 1958, an information was preferred against the respondents alleging that on Mar. 4, 1958, they were guilty of an offence under s. 3 of the Road Traffic Act, 1930, in that they did unlawfully use a vehicle, to wit a motor Scammel tractor, on a road in the city of Leeds in contravention of art. 18 (1) of the order duly made by the Minister of Transport and Civil Aviation under the said Act called the Motor Vehicles (Authorisation of Special Types) General Order, 1955, in that, the width of the load of the said vehicle being in excess of nine feet six inches, there were not at least three persons inclusive of the driver or drivers in attendance while the vehicle was being driven to attend to the vehicle and its load contrary to the said Act and the order. On the same day a second information was preferred against the respondents in the same words, but relating to a Leyland tractor. The two charges were heard together on June 27, 1958, and judgment was given on July 10, 1958.

The following facts were found. (a) The respondents were the owners of the vehicle or vehicles in question and were on Mar. 4, 1958, using the same on a road in the city of Leeds for the purpose of transporting a heavy load described as a cylindrical section; (b) the maximum width of the vehicle including the load exceeded nine feet six inches; (c) at all material times there were never fewer than four men including the drivers of the tractors hereinafter mentioned in direct attendance on the load and what carried it; (d) the respondents, in giving notice as required by law to the Leeds City Police of their intention to use the vehicle or vehicles to transport the load therein described referred to the tractors as separate motor vehicles, also to twin 8-wheeled pneumatic tyred bogies and the cylindrical section; (e) the load and vehicle or vehicles consisted of the following parts—(1) the load itself, that is the cylindrical section, which

was not borne on a trailer in any usually accepted sense but was rigged in such a way as to act as its own " trailer " in that inside the cylindrical section there was a construction from which there protruded, at each end of the cylindrical section, two metal girders, so that the extremities of such girders were attached to the fore and hind bogies next referred to; (2) there was a bogie at the front of the cylindrical section and a second bogie at the rear; (3) there was a motor tractor at the front of the cylindrical section attached to the front bogie and a second motor tractor at the rear attached to the rear bogie; —(f) the whole of the transport, consisting of the load and machines above referred to, was connected up so as to move as one in bearing and transporting the load.

It was contended for the appellant that: (i) each of the vehicles mentioned in each of the informations was a vehicle within the meaning of art. 1 of the order; (ii) therefore at least three persons, inclusive of the driver or drivers, should have been in attendance on each vehicle; (iii) on the facts as found or agreed the offences alleged had been committed. For the respondents it was contended that: (i) under art. 18 (1) " any vehicle " must contemplate more than one mechanically propelled vehicle because in the same article it referred to " driver or drivers " but never to a " vehicle or vehicles " and there could be only one driver at any one time of a mechanically propelled vehicle; (ii) in any event there was only one mechanically propelled vehicle with a " load "; (iii) article 14 (f) stated:

> " The overall width of a heavy motor car, locomotive or tractor shall not exceed nine feet six inches and the overall width of a trailer shall not exceed nine feet six inches except where a greater width (but in no case exceeding twenty feet) is necessary for the safe carriage of the particular load carried by the trailer."

Therefore when it stated in art. 18 (1) " where the overall width of any vehicle, the use of which upon roads is authorised by this part of this order, and its load or of the vehicle or its load exceeds nine feet six inches " the word " vehicle " could only apply to the trailer portion of the combination because it was only a " trailer " which could exceed nine feet six inches in width, from which it would follow that the order really required that there should be three people to attend to the load; (iv) even if all these contentions were incorrect, the respondents could not be guilty under both informations because there were four people in attendance including the " driver or drivers " and there was therefore the necessary number to attend to one mechanically propelled vehicle and its load.

The stipendiary magistrate held that the motor tractors used in the transport formed, together with the bogies and cylindrical section, one vehicle and load within the meaning of art. 18 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955; and found the respondents not guilty on both charges. The prosecutor appealed and the question for the opinion of the High Court was whether or not, in the light of the facts found, the magistrate was right in so holding.

Widgery, Q.C., and *N. C. Bridge* for the appellant.
J. D. May for the respondents.

LORD PARKER, C.J.: The respondents were minded to move a very large steel cylinder which was in diameter over nine feet six inches, and they gave, as they had to give, notice of this. They moved it by means of two tractors, one a Scammel and the other a Leyland. As appears from photographs

the cylinder itself was mounted at each end on bogies. The bogies in turn were attached at the forward end to one tractor and at the rear end to another tractor, and by that means as I understand it one tractor would pull the bogies and the cylinder and the tractor at the back would merely guide it round corners. The exact method of the attachment of the tractor to the bogies is not found in the case.

Article 18 (1) of the Motor Vehicles (Authorisation of Special Types) General Order, 1955 (S.I. 1955 No. 1038) provides so far as is relevant:

> "Attendants. Where the overall width of any vehicle, the use of which upon roads is authorised by this part of this order, and its load or of the vehicle or its load exceeds nine feet six inches, at least three persons inclusive of the driver or drivers shall while the vehicle is being driven be in attendance to attend the vehicle and load . . ."

The learned magistrate found in effect that this combination of vehicles was, within the article, one vehicle, and since there were two drivers and two attendants, four people in all, the respondents had fulfilled their obligation for one vehicle, that is to say, three persons inclusive of the driver or drivers. The learned magistrate found that as a matter of law on the construction of the order. He says in para. 5 of the Case Stated:

> "Article 18 envisages only two factors in relation to a transport within its provisions—(a) the load and (b) that which carries it, therein called 'the vehicle'. (c) The article nowhere uses the term 'vehicle or vehicles' but it does use the term 'driver or drivers'. (d) It is reasonable to infer that the expression 'driver or drivers' imports the use of more than one self-propelled motivating vehicle inasmuch as such a vehicle must be driven by one person at one time, notwithstanding that he may have assistants either to take his place or for any other purpose."

The question which he leaves to the court is:

> "Whether or not I was right in law in holding that, in the light of the facts found and the terms of art. 18 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955, the motor tractors used in the transport formed, together with the bogies and cylindrical section, one vehicle and load within the meaning of the article."

In my opinion, it is quite impossible to read the word "vehicle" where it occurs in art. 18 as in effect meaning vehicles or a combination of vehicles. Such a construction not only does violence to the language actually used, but also is to be contrasted with other provisions in the order which explicitly provide either for vehicles or for a combination of vehicles. Thus, art. 14 (k) provides "no vehicle or combination of vehicles shall carry more than one abnormal indivisible load at any one time". Article 21, which is providing for vehicles carrying abnormal indivisible loads over bridges, specifically provides "that in this article . . . a combination of vehicles carrying an abnormal indivisible load shall be deemed to be one vehicle". Further it would appear, from the passage which I have read, that the learned magistrate attached considerable importance to the expression "the driver or drivers", because he said that although "vehicle" was only used in the singular, the presence of those words denoted that more than one self-propelled vehicle was being considered under the term "the vehicle". Counsel for the appellant has drawn our attention to various passages in the Road Traffic Act, 1930, under which this order was made, and it is to be observed that in s. 17 (1) it is provided that "In the case of heavy locomotives and light locomotives, two persons shall

be employed in driving or attending the locomotive whilst being driven on any highway . . .". Therefore, one starts with this, that the Act under which this order was made is dealing with a case where a single vehicle might well have more than one driver. Accordingly, on the plain reading of art. 18 one must give "any vehicle" its ordinary meaning, and must not consider that term as including a combination of vehicles. The ordinary meaning so to be given to the words "any vehicle" in this article clearly covers not merely a vehicle that is a motor-propelled vehicle but also a trailer itself. That being so, it is enough for this court to answer the question raised by the magistrate in the negative. It is not right to hold that as a matter of law a combination of vehicles is a vehicle nor, I might add, on the facts of this case as far as they are known, could it conceivably be possible to hold that this method of transport, which I have described, consisted merely of one vehicle. Accordingly, in my judgment this case must go back to the learned magistrate to consider the matter afresh. What the exact position is in this case it is quite impossible for this court to say. There are many alternatives which will be for the magistrate to decide. It may be—but we do not know—that the bogies are attached to the tractors at each end in such a way as to form part of the tractors, in which case there would be two vehicles each of which is carrying as its load a load which was in excess of nine feet six inches. It may be, on the other hand, that each of the sets of bogies forms a vehicle in itself, and a third alternative may be that the cylinder resting as it does on the bogies at each end and attached by iron girders to them forms itself a trailer, in which case there would be a single vehicle. In that event, however, even if it were to be treated as a single vehicle, a trailer of more than nine feet six inches would have to have three attendants quite apart from the necessary drivers of the two tractors. It will be for the magistrate to find the facts and, in particular, to see whether these respondents have been rightly charged, and in that connexion he will no doubt pay attention to any application which may be made to him to amend.

For these reasons it is sufficient to answer the question raised in the negative and to remit the matter to the magistrate.

Counsel for the respondents raised the point that it was unnecessary to send the case back because, as he put it, in any event whatever the findings were the result must be in his clients' favour. His argument, quite shortly, was that in construing art. 18 one could read for "vehicle", "vehicles" in the plural and that accordingly whatever the number of vehicles, be they two, three, four or five, it would never be necessary in any case to have more than three persons inclusive of the driver or drivers. It is sufficient to say that in my judgment that argument fails. It seems to me that in the context here it is quite impossible to read the plural for the singular; indeed, if that had been the intention nothing would have been more easy than to provide that however many vehicles were used for a single load no more than three attendants were necessary.

DONOVAN, J.: I entirely agree.

ASHWORTH, J.: I agree.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, for *Town Clerk*, Leeds; *Goldingham, Wellington & Co.*, for *Morrish & Co.*, Leeds.

T.R.F.B.

COURT OF APPEAL

(MORRIS and SELLERS, L.JJ. and WYNN-PARRY, J.)

January 15, 16, February 9, 1959

SOCIETY OF MEDICAL OFFICERS OF HEALTH *v.* HOPE (VALUATION OFFICER)

Rates—Local valuation court—Appeal—Res judicata—Scientific society's claim for exemption—Claim upheld on appeal relating to previous valuation list—Decision not appealed—Circumstances admitted to be unchanged.

In 1951 a hereditament occupied by a society was held by a local valuation court to be exempt from rating under the Scientific Societies Act, 1843, and there was no appeal by the valuation officer against that decision. In the quinquennial valuation list which came into force in 1956 the hereditament was assessed as a rateable hereditament. On an appeal to the local valuation court arising out of a proposal by the society for the alteration of the list by showing the hereditament as exempt from rating the valuation officer did not contend that the society's activities had changed since 1951.

HELD (SELLERS, L.J., dissenting): the decision in 1951 related only to the valuation list existing at that time, for the court had then jurisdiction over that list only and not over future lists, and, therefore, there was no res judicata which could give rise to the valuation officer being estopped from contesting the appeal as to the rateability of the hereditament in relation to the list of 1956.

APPEAL by the ratepayers, the Society of Medical Officers of Health, against a decision of the Lands Tribunal dismissing the contention of the society by way of a preliminary point that the respondent, the valuation officer, could not be heard to say that the society was not entitled to exemption from rating under s. 1 of the Scientific Societies Act, 1843, in respect of a hereditament which it occupied, comprising offices, and other rooms, in the metropolitan borough of St. Pancras. The society contended that the tribunal misdirected itself in holding that, notwithstanding a decision of the local valuation court given on Oct. 24, 1951, that the hereditament was exempt from rating under s. 1, it was open to the valuation officer to say that it was not so exempt in respect of a later year.

Tolstoy for the society.
Phillimore, Q.C., and *P. R. E. Browne* for the valuation officer.

Cur. adv. vult.

Feb. 9. The following judgments were read.

MORRIS, L.J.: In the year 1951 the Society of Medical Officers of Health was in occupation of a hereditament at Tavistock House, Tavistock Square, in London. That hereditament was placed on the then existing valuation list. The society claimed to be exempt from the payment of rates. Exemption was claimed on the basis of the provisions of s. 1 of the Scientific Societies Act, 1843. The relevant parts of that section are as follows:

". . . No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses, or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members . . ."

and then there follows a provision as to a certificate. The society would, therefore, be exempt from being rated if (a) it was a society instituted for purposes of science, literature or the fine arts exclusively; (b) it occupied the hereditament for the transaction of its business and for carrying into effect its purposes; (c) it was supported wholly or in part by annual voluntary contributions; (d) it did not and could not make any dividend, gift, division or bonus in money to members and provided that a certain certificate was obtained.

The society proceeded to take the step which was open to it under the procedure laid down by the Local Government Act, 1948. Section 40 of the Act provides as follows:

> " (1) Any person who is aggrieved—(a) by the inclusion of any hereditament in the list; or (b) by any value ascribed in the list to a hereditament or by any other statement made or omitted to be made in the list with respect to a hereditament; or (c) in the case of a building or portion of a building occupied in parts, by the valuation in the list of that building or portion of a building as a single hereditament, may at any time make a proposal for the alteration of the list so far as it relates to that hereditament.
>
> " (2) The valuation officer may at any time make a proposal for any alteration of a valuation list.
>
> " (3) Any such proposal as is mentioned in the previous provisions of this section is in this Part of this Act referred to as ' a proposal ' ."

Section 41 deals with the proceedings on proposals. Sub-section (1) is as follows:

> " Every proposal must—(a) be made in writing and, except where it is made by the valuation officer, be served on the valuation officer; (b) specify the grounds on which the proposed alteration is supported; (c) comply with any requirements of any regulations made by the Minister with respect to the form of proposals and otherwise with respect to the making thereof."

Sub-section (4) provided:

> " Where the proposal is made otherwise than by the valuation officer, the valuation officer may, within twenty-one days from the date on which the proposal is served on him, serve on the maker of the proposal notice in writing of objection to the proposal."

Then sub-s. (6) provided:

> " Where notice of objection is made and is not unconditionally withdrawn —(a) the person making the proposal may, by notice of appeal served within the time and on the persons hereinafter mentioned, appeal against the objection to a local valuation court; and (b) no alteration shall be made in the list in pursuance of the proposal except where notice of appeal is given as aforesaid and then only either—(i) in pursuance of the directions of a court or arbitrator given under the subsequent provisions of this Part of this Act; or (ii) by agreement between all the persons entitled to be heard on the appeal."

By later legislation, the Rating and Valuation (Miscellaneous Provisions) Act, 1955, certain new sub-sections were substituted for the original ones and the present provisions of paras. (b) and (c) of sub-s. (6) are as follows:

> " (b) if the proposal was made otherwise than by the valuation officer, he may, at any time within the period of five months beginning with the relevant date, give notice in writing to the person who made the proposal that he objects to the proposal, and that the said person, if he does not withdraw the proposal within fourteen days, will be treated as intending to

appeal against the valuation officer's objection to the proposal; (c) not less than fourteen nor more than twenty-eight days after the valuation officer has given a notice under the last preceding paragraph, he shall, unless the proposal has then been withdrawn, transmit a copy of the proposal to the clerk to the appropriate local valuation panel, together with a copy of the notice under the last preceding paragraph, and of any notice of objection to the proposal which has been served under sub-s. (3) of this section and has not been unconditionally withdrawn."

The appeal referred to is to a local valuation court. Section 44 (1), as amended by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 15, sched. 8. Part 1, provides as follows:

"Local valuation courts constituted as hereinafter provided shall be convened as often as may be necessary for the purpose of hearing and determining appeals under the preceding provisions of this Part of this Act against objections to proposals for the alteration of valuation lists."

Section 48 deals with the sittings, procedure and powers of local valuation courts. Sub-sections (2), (3) and (4) are, in their present form, as follows:

"(2) The procedure of local valuation courts shall, subject to such regulations, if any, as may be made in that behalf by the Minister, be such as the court in question may determine, and every such court—(a) shall, unless the court otherwise order, on the application of any party to the appeal and upon being satisfied that the interests of either party would be prejudicially affected, sit in public; (b) may take evidence on oath and shall have power for that purpose to administer oaths.

"(3) On the hearing of an appeal to a local valuation court—(a) the appellant; and (b) the valuation officer, when he is not the appellant; and (c) the owner or occupier of the hereditament to which the appeal relates, when he is not the appellant; and (d) the rating authority for the area in which the hereditament in question is situated, when that authority is not the appellant; and (e) the objector, where he is not one of the persons aforesaid, shall be entitled to appear and be heard as parties to the appeal and to examine any witness before the court and to call witnesses.

"(4) After hearing the persons mentioned in the last preceding sub-section, or such of them as desire to be heard, the local valuation court shall give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to them to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the court to be well founded . . ."

and the valuation officer must cause the list to be altered accordingly.

The society availed itself of the right to make a proposal. The proposal was "to delete the hereditament from the valuation list" on the ground that it was "exempt from payment of rates under the Scientific Societies Act, 1843". The valuation officer objected to the proposal. The resultant appeal, which was the appeal of the society against the objection of the valuation officer, came before the local valuation court for North-East London on Oct. 24, 1951. Its decision was that the hereditament was "exempted from rating under the Scientific Societies Act, 1843". It gave directions that the valuation list should be amended to accord with its decision. The valuation officer could have appealed against that decision to the Lands Tribunal (see the Lands Tribunal Act, 1949) but no appeal was lodged.

It was provided by s. 34 (1) and (2) of the Local Government Act, 1948, as follows:

"(1) Subject to the provisions of sub-s. (3) of this section, a new valuation list shall be made for every rating area, so as to come into force . . . (b) inside London, on Apr. 6, 1952, and the periods for which the valuation lists in force at the date of the passing of this Act are to remain in force shall be extended accordingly."

Then follows a proviso which I do not read. Then sub-s. (2):

" Thereafter new valuation lists shall, subject to the provisions of sub-s. (3) of this section, be made for all rating areas, whether within or outside London, so as to come into force on Apr. 1 in the following years, that is to say, the year 1957 . . ."

and each fifth successive year. By virtue of a later Act (the New Valuation Lists (Postponement) Act, 1952), and of orders made under that Act, the dates laid down by the Act of 1948 were altered. But a new valuation list had to be made which was to come into force on Apr. 1, 1956. A new list was made, and in it was entered the hereditament of the society together with figures of £300 gross value, and £247 rateable value.

The society claimed that it could still qualify for the exemption given by the Scientific Societies Act, 1843. It is to be observed that a society might qualify for exemption in circumstances existing at one date and might not qualify in circumstances existing at a different date. Accordingly the society made a proposal on Sept. 25, 1956. That was a proposal for the alteration of the list " by the exclusion of the hereditament from the valuation list " on the grounds of " exemption from payment of rates under the Scientific Societies Act, 1843 ". Strictly speaking the society could not claim the " exclusion of the hereditament " from the list but could only claim to have it marked as exempt (see r. 22 of the Valuation Lists Rules, 1955). The valuation officer made objection to the proposal of the society, and as a result the matter came before the local valuation court on June 13, 1957. It was the appeal of the society against the valuation officer's objection to its proposal. It is important to see what was the question which was before the court. It was in effect whether the society was entitled in respect of the new valuation list to have an entry made that it was exempt from rates. That raised the question whether in reference to the proposal made by the society in 1956 the facts and circumstances were such that the provisions of s. 1 of the Act of 1843 would give exemption.

The society as appellant had the right to begin, but apparently no evidence was given; and the course that was followed was that the court wished the valuation officer to state whether he alleged that the society's constitution or activities were different from what they were in 1951. The court, after hearing the parties, adjourned the hearing deciding that

" the court is satisfied that the question of exemption of the society on the basis of its memorandum of association and facts existing in 1951 has already been decided between these parties and, accordingly, we are not prepared to hear the valuation officer's objection unless he can bring evidence to show some variation in the society's constitution or activities since 1951."

The solicitor for the valuation officer made his attitude quite clear in a letter written on June 14. It was that the valuation officer did not wish to give evidence to show changes or differences in the society's constitution or activities since 1951. His contention was that in view of the then existing constitution and activities of the society it was not entitled to exemption. But, in view of the statement of the chairman of the court that, unless the valuation officer brought evidence of a variation since 1951, the court was " not prepared to hear the

valuation officer's objection ", there seemed no purpose in the further attendance of the valuation officer. The relevant parts of the letter are important and read as follows:

> " The valuation officer's case is that the Society of Medical Officers of Health is not entitled to exemption under the provisions of the Scientific Societies Act, 1843, in view of the constitution and its activities. The valuation officer does not contend that any alteration has been made in the constitution of the society since the earlier decision of the local valuation court which was given on Oct. 24, 1951, and he does not suggest that the society now carries on activities which it did not then carry on. The valuation officer relies on the present constitution of the society and its present activities, and he is not in a position to say whether the present activities are in any way different from those to which the court was referred in 1951; whether or not they are different is, it is submitted, entirely irrelevant. The hearing was adjourned to enable the valuation officer to give evidence of any changes or differences in the society's activities, but the valuation officer does not wish to take advantage of this. Accordingly, in view of the statement made by the chairman at the close of the proceedings on June 13, all that will remain for the court to do will be, it seems, to issue a direction that the hereditament occupied by the society should be treated as ' exempt '. In these circumstances the court may not consider it necessary to arrange a further formal hearing for the purposes of issuing its formal direction and might prefer to dispense with any further hearing. You will no doubt let me know the court's wishes in this respect in due course. It will, or course, be appreciated that the valuation officer is in no way withdrawing his notices of objection to the society's proposals and that it is his present intention to take the case to the Lands Tribunal."

It does not appear that at that stage the society could make any plea of res judicata. The society had gone to the local valuation court to appeal against the objection of the valuation officer to its proposal to have an entry made in the newly made valuation list to the effect that it was exempt from rates. The society was doubtless in a position to give evidence on the relevant matters, and its case was that it qualified for the exemption given by the Act of 1843. The matter was in a sense taken out of its hands by the court.

In the result the local valuation court gave its decision on June 24, 1957. It was in the following terms:

> " Following the views of the court expressed at the hearing on June 13, 1957, and as a result of a letter received from the solicitor's office of the Inland Revenue dated June 14, 1957, the court hereby decide and direct that the offices, 3rd floor rooms, 483–486, Tavistock House, South Wing Extension, Tavistock Square, be exempted from rating under the provisions of s. 1 of the Scientific Societies Act, 1843."

That decision must have been given on the assumption (though not on the proof) that the occupation of the society at the time of its proposal in 1956 was similar to the occupation in 1951, and that other existing facts were similar to those which existed in 1951, and on the basis that the constitution (whether the same as before or not) showed that the society was instituted for purposes of science, literature or the fine arts exclusively.

The valuation officer gave notice of appeal on July 11, 1957. Appeal lay to the Lands Tribunal. It does not seem to me that the right of the valuation officer to appeal can be questioned. Pursuant to the Lands Tribunal Rules, 1956, the valuation officer as appellant lodged his case, and the society lodged its reply.

In the reply it was stated that the society would rely on a point of law which it formulated as follows:

> "The appellant [valuation officer] cannot now be heard to say that the respondent society is not entitled in respect of the said hereditament to exemption from rating under the provisions of s. 1 of the Scientific Societies Act, 1843, by reason of the following matters:—(a) On July 27, 1951, the respondent society made a proposal for the exclusion of the said hereditament from payment of rates under the said Act of 1843, to which proposal the appellant [valuation officer] gave notice of objection. (b) On Oct. 24, 1951, the local valuation court decided and directed that the said hereditament should be exempted from rating under the said Act of 1843."

In effect the society was seeking to preclude the valuation officer from appealing against the decision which the society secured in its favour.

When the case reached the Lands Tribunal it was agreed by both parties that the tribunal should deal with this contention of the society as a preliminary point. The Lands Tribunal in a careful decision gave its reasons for declining to dismiss the appeal on the plea of res judicata. The Lands Tribunal stated a Case for the decision of the Court of Appeal, the question stated being whether on the findings of fact recorded in the decision, the Lands Tribunal came to a correct decision in law in rejecting the contention of the society as recorded above.

When the society was before the local valuation court in 1957 it was an appellant who was asking for an order in its favour: it had taken the proper initiative, following the procedure laid down in the statutory code, to obtain an entry on a new valuation list in a form to which it submitted that it was entitled. It would not have availed it merely to produce the decision of 1951. The local valuation court in 1951 could not decide, and did not purport to decide, what entry should be made on some future valuation list not then in existence. The court in 1957 had to be satisfied as to the facts existing at the time of the new valuation list and to consider the position at the date of the society's proposal. The circumstance that the court had decided what the facts were in 1951 did not establish what they would be in 1956. It is, of course, clear that in 1957 the facts could be very speedily and easily ascertained if someone was prepared to say that they were the same as or similar to those which existed in 1951 when the court had a previous appeal before it. But, by whatever method the facts are ascertained in 1957, the court, in 1957, after having ascertained the facts, was giving its decision on the question as to what entry should be made in the new valuation list. What was decided in 1951 was as to what entry should or should not be made in the valuation list then existing. A decision then made on that question cannot preclude the court from giving whatever it considers to be the correct decision on a later question which later arises, i.e., what entry should be made in a later list on the basis of the facts and circumstances later existing. If by the date of the later hearing the superior courts have given guidance on points of law, it would be wrong not to follow such guidance.

The underlying principle supporting a plea of res judicata is that it is desirable that litigation should end and that it is undesirable that a person should be vexatiously pursued in litigation in regard to a matter that has already been decided. It has, however, always been clear that the plea will only avail if it appears that there is an attempt to re-open the very matter that has been decided: compare *Re Koenigsberg, Public Trustee* v. *Koenigsberg* (1).

(1) [1949] 1 All E.R. 804; [1949] Ch. 348.

In *Inland Revenue Comrs.* v. *Sneath* (1) LORD HANWORTH, M.R., said:

"There must be a lis inter partes in which the point relied on for establishing the estoppel was not merely incidentally, or collaterally, discussed and litigated, but was fundamental to the conclusion reached by the court. The court must be one of competent jurisdiction that has seisin of the case for the purpose of reaching a final decision inter partes, though it may be a private tribunal such as an arbitrator whose forum is a domestic one constituted by the parties themselves."

LORD HANWORTH, M.R., referred to the judgment of LORD SELBORNE, L.C., in *R.* v. *Hutchings* (2). LORD SELBORNE said:

"The principles of the law of estoppel by a judgment, inter partes, to which alone I think it necessary to refer, may be taken from DE GREY, C.J.'s, opinion in the *Duchess of Kingston's Case* (3) and from that of KNIGHT BRUCE, V.-C., in *Barrs* v. *Jackson* (4). The decision in the latter case was reversed, but on a ground not at all touching the statement of principles contained in it. 'The judgment' (said DE GREY, C.J.) 'of a court of concurrent' (or of exclusive) 'jurisdiction, *directly upon the point*, is conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence' (that is, as I understand the meaning of the Chief Justice, conclusive evidence) 'of any matter which came collaterally in question, though within their jurisdiction; *nor of any matter incidentally cognisable*, nor of any matter to be inferred by argument from the judgment'. KNIGHT BRUCE, V.-C., said: 'It is, I think, to be collected that the rule, against re-agitating matter adjudicated, is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may be as to its immediate and direct object, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question; provided *the immediate subject of the decision* be not attempted to be withdrawn from its operation, *so as to defeat its direct object*'."

On behalf of the society it was not contended that a decision of a local valuation court or of the Lands Tribunal on a question as to the value of a hereditament could be regarded as binding for the future. But it was submitted that in the present case there had been a decision on a question of status and that the local valuation court had in 1951 decided that the society had a status which gave it exemption from rates, and that that decision was binding for the future unless in the future the facts were not comparable with those previously existing. I cannot accept this submission. The local valuation court in 1951 did not and could not decide any other question than that which was before it. That question was whether an entry should be made in the valuation list in the manner set out in the proposal of the society. The local valuation court never purported to give a decision which could operate in relation to the year 1956.

It is urged, however, that the decision given in 1951 must have involved the conclusion, as a matter of law, that the society was "instituted for purposes of science, literature or the fine arts exclusively". Though there is no judgment of

(1) [1932] All E.R. Rep. 739; [1932] 2 K.B. 362.
(2) (1881), 45 J.P. 504; 6 Q.B.D. 300.
(3) (1776), 1 East, P.C. 468; 1 Leach, 146; 20 State Tr. 335; 2 Smith L.C. 12th Edn. 754.
(4) (1845), 1 Ph. 582.

the local valuation court in 1951 which can be read so as to see how this aspect of the matter was dealt with, it is true to say that the court in 1951 ought not to have decided as it did unless it did conclude that the society was instituted for purposes of science, literature, or the fine arts exclusively. But, in my judgment, no estoppel can arise even in a limited form for the reason that in 1951 the local valuation court had no jurisdiction save to deal with the then existing valuation list. Its decision on any incidental issue of fact or law, even though necessary in order to decide as to the valuation list which was before it, could not, in my judgment, be conclusive in reference to any future entries to be made on any future valuation list. A new list came into existence because there was a statutory obligation to make it. The force and effect of any decision relating to the list that existed in 1951 became spent and exhausted when that list was replaced by the new valuation list.

Both parties agree that it is a general principle that, where a question has been decided by a court of competent jurisdiction in a lis inter partes, those parties are estopped from re-opening this decision in any subsequent litigation between the same parties as to the same question. In their careful addresses to the court learned counsel cited numerous authorities. I do not propose to refer to all of these for the reason that many of them merely showed the application of the principle to different sets of circumstances and different topics.

We were referred to various decisions in tax cases, including *Patuck* v. *Lloyd* (1) where LORD GREENE, M.R., said:

> "There is no such thing as res judicata in respect of the decisions of Inland Revenue Commissioners. They may or may not follow their previous decision; but they are not bound to because the subject-matter is a different year's tax and a different year's assessment and is not the same as the subject-matter of the previous ruling."

It was submitted on behalf of the valuation officer that a proceeding before a local valuation court is not a lis inter partes but is more in the nature of necessary administrative machinery for determining what entries should be made in a valuation list. But, in agreement with the view of the Lands Tribunal, I am not prepared to accept this submission. The provisions of s. 48 of the Local Government Act, 1948, to which I have referred, show that a local valuation court is not an assessing authority. The court, after hearing such parties as are entitled to appear and be heard and after hearing evidence, must give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as are necessary in order to give effect to such contention of an appellant as it decides to be well founded. But, though the proceedings in 1957 can be regarded as being subsequent litigation between parties who previously litigated in 1951, the question in issue in 1957 was not, in my judgment, and for the reasons which I have given, the same question as that which was in issue in 1951.

In *Leith Harbour & Docks Comrs.* v. *Inspector of the Poor* (2) an action was brought in 1861 by the inspector of the poor and three owners or occupiers of property in North Leith against the Leith Harbour and Docks Commissioners to have it declared that they were liable to be assessed for the relief of the poor in respect of the lands, harbours, docks and property held by them, and that in estimating the yearly value all harbour dues and miscellaneous dues collected by them should be included and taken into account. One defence of the commissioners was that of res judicata; they said that the very question raised in the

(1) (1944), 171 L.T. 340.
(2) (1886), L.R. 1 Sc. & Div. 17.

case had been already decided in a previous suit between the same parties. Further they said that the property sought to be charged was held by them solely for the benefit of the public, and that the revenues were appropriated to the maintenance of the harbour and the payment of the cost of construction of works. It appeared that some years previously a question had been raised as to the liability of the commissioners to contribute to the rate for the year from Whit-Sunday, 1846, to Whit-Sunday, 1847. The commissioners in then denying liability had then pleaded the same ground of immunity as they later pleaded in the 1861 case as above referred to (2). The matter was litigated up to the House of Lords, and the House of Lords in 1855 (*Leith Harbour Comrs.* v. *Inspector of the Poor* (1)) reversed a decision of the Court of Session adverse to the commissioners. But when the decision of the House of Lords of 1855 was examined in considering the latter case in 1866 it was manifest that the decision in the earlier case had turned on a totally different point from that of the immunity as claimed by the commissioners. In the later case, which also went to the House of Lords, the plea of res judicata was on this ground held to be invalid by LORD CRANWORTH, L.C. LORD CHELMSFORD, with whom LORD KINGSDOWN agreed, while holding that the decision of the House of Lords in 1855 had left open the question of immunity from assessment, gave an additional reason for the failure of the plea of res judicata. He said:

> "It appears to me that the argument for the appellants has not sufficiently attended to the nature of a plea of res judicata. The maxim of the civil law, 'res judicata pro veritate accipitur', applied only when the identical question, which had been once judicially decided, was again raised between the same parties—the rule laid down in the Digest, lib. xliv. t. 2, s. 3, being 'exceptionem rei judicatae obstare, quoties eadem questio inter easdem personas revocatur'. This plea, therefore, is exactly analogous to a plea in the English courts of 'judgment recovered'; in which it is necessary, in order to make the judgment operate as an estoppel, that it should be between the same parties and upon the same subject-matter coming directly in question, either in the same court, or in another court of co-ordinate jurisdiction. Without considering whether the pursuers are different or substantially the same in the present and in the former action, or whether the circumstances under which the question is now raised have been changed from what they were before by the Act of the 23 & 24 Vict. c. 48, it is sufficient to say that the proceeding in the present case being for a different rate from that upon which the former judgment proceeded, the cause of action is different, and the plea of res judicata is consequently inapplicable."

In my judgment, the reasoning that a proceeding for one rate involves a different cause of action from that in a proceeding for a different rate applies to the situations where different valuation lists are in question.

A corresponding view was taken by the Privy Council in *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (2). A New South Wales statute laid down a formula for ascertaining the unimproved capital value of a mine for rating purposes. In reference to the assessment of a mine in one year, a question arose as to the correct construction of the statute. That question was decided by the High Court of Australia on appeal from the Supreme Court of New South Wales, to which court there had been an appeal from a judge of the district court. In reference to the assessment of the mine for a later year, the Supreme Court of New South Wales considered that it was bound by the previous decision of the

(1) (1855), 2 Macq. 28.
(2) [1926] A.C. 94.

High Court of Australia as to the construction of the statute. On appeal to the Privy Council, it was held that the question as to the correct method of ascertaining the unimproved value was not res judicata, and in the judgment of the Board the matter was thus expressed:

> "It was also contended before this Board on behalf of the respondents that having regard to the said decision of the High Court of Australia the question raised by this appeal is res judicata as between the appellants and the respondents, and the appellants are estopped from contending that such decision of the High Court of Australia is wrong. It has been pointed out that no such question was raised or pleaded either before the district court or the Supreme Court in New South Wales, nor has there been any adjudication or finding upon it. There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely, the valuation for a different year and the liability for that year. It is not eadem questio, and therefore the principle of res judicata cannot apply."

These authorities lend support to the view which I have expressed, and, for the reasons I have given, I consider that the Lands Tribunal was correct in rejecting the plea of res judicata.

SELLERS, L.J.: On Oct. 24, 1951, the local valuation court for the area, on the appropriate proceedings having been taken, held that the appellant ratepayer, the Society of Medical Officers of Health, fulfilled all the necessary requirements of the Scientific Societies Act, 1843, and was exempted from liability to rates in respect of premises occupied by it as offices being the third floor rooms, 483-486, Tavistock House, Tavistock Square, W.C.1. The application for exemption had been contested by the valuation officer (the present respondent) but the decision in favour of the society was not appealed from and the premises became and remained unrated.

Under s. 34 of the Local Government Act, 1948, as amended by the New Valuation Lists (Postponement) Act, 1952, and orders made thereunder, a new valuation list was made to come into force on Apr. 1, 1956. The society's premises were entered in the new list with an assessment of £300 gross value, £247 rateable value.

By the appropriate procedure the society again claimed exemption on the same ground as in 1951, namely, that it was exempted from being assessed or rated, or being liable to be assessed or rated, or being liable to pay any rates by reason of the Scientific Societies Act, 1843. Notwithstanding the adjudication in October, 1951, the valuation officer objected to such exemption, and the matter came before the same court as before, the local valuation court for North-East London on June 13, 1957. The society relied on the decision of 1951 that it was a scientific society entitled to exemption under the Act of 1843, and the court, no doubt itself cognisant of its previous decision, held that the issue had already been decided by it, and, unless there was some variation in the society's constitution or activities since 1951, the court was not prepared to hear the valuation officer's objection.

Some question was raised before us as to the form rather than the substance, I think, of what happened at the local valuation court. The position was that the society was clearly relying on the decision which had been reached, after a contest between the parties, in 1951, and was saying that, whether it was a scientific society or not was res judicata and more accurately created an estoppel per rem judicatam. It was open to the valuation officer to say that that decision

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was not binding between the parties, because in the intervening years the facts had changed and were so different that, whether or not the society came under the Act of 1843 had to be judged afresh in the light of the different circumstances.

The local valuation court adjourned the hearing to enable the valuation officer to challenge the reliance on the decision of 1951 and to contend that the decision no longer applied to the altered circumstances, but he indicated his attitude in the letter of June 14, 1957, cited in full by the Lands Tribunal, and as a consequence on June 24, 1957, the local valuation court made an order exempting the society's premises from rating on the ground that the question of exemption of the society on the basis of its memorandum of association and facts existing in 1951 had already been decided between the parties. In the letter it was stated:

> "The valuation officer does not contend that any alteration has been made in the constitution of the society since the earlier decision of the local valuation court which was given on Oct. 24, 1951, and he does not suggest that the society now carries on activities which it did not then carry on."

Whatever the next sentence in the letter may have intended to convey or achieve, it states in part that, even if the then activities of the society were the same as in 1951, it was entirely irrelevant. If the valuation officer had wished, he could no doubt have required the society to prove that the circumstances were the same (it seems a little pedantic to require, as was submitted, that it should be described as similar when one is dealing with a society's constitution and activities and the user of premises) before it could be said and held that the matter in issue was res judicata. That was not the course taken by the valuation officer. He was prepared to accept that the circumstances had not changed, and that change or no change was irrelevant, and to argue that in rating matters in respect of entries in a new valuation list, or at least in respect of the entry of these premises, no issue decided on a previous occasion could be binding.

The valuation officer's position in this litigation is emphasised by the course which the dispute subsequently took. The parties agreed to the trial of a preliminary point of law by the Lands Tribunal on the ground that the valuation officer could not be heard to say that the society was not entitled in respect of the premises in question to exemption from rating under the provisions of s. 1 of the Scientific Societies Act, 1843, because the local valuation court had in 1951 decided and directed that the society should be exempted thereunder. This appeal, in my view, must be heard, and can only be heard, as a preliminary point on the basis that the facts and circumstances do not differ from those existing in 1951 in so far as the issue of the society's right to exemption from rateability under the Act of 1843 is concerned.

The question for our consideration is not whether the valuation officer or the local valuation court, if invoked, can consider afresh whether the society's premises should be included in the new valuation list as premises to be rated—of course it must—but whether or not in considering that question there can be litigated again the society's right to exemption under the Act of 1843, if all the relevant circumstances of its constitution and its user of the premises are unchanged. There is, as I see it, no question of the local valuation court having jurisdiction, or even purporting to exercise jurisdiction, to decide in 1951 what should or should not be included in a 1956 or any other valuation list except the then current list. It clearly could do no such thing. Entries in a new valuation list, and in this case the entries in the 1956 valuation list, have to be considered if challenged by the procedure provided. The submission of the society is that in its case an estoppel per rem judicatam arises because its claim for exemption can in no way be differentiated from the claim it has already established.

The basis of an estoppel per rem judicatam is that it is in the public interest that there should be an end to litigation, and I do not favour the submission that a good general ruling to this effect should be held inapplicable because the decision relied on could in effect be re-opened by someone who was not a party to the original proceedings. It is for the society in this case, desirous as it is of setting up res judicata as a bar to the claim against it, that its premises are rateable, to bring itself within all the requirements to establish the plea, except in so far as they are admitted by the valuation officer. It has been accepted that the parties are the same in the litigation now raised as in the decision of 1951. There seem to be five other elements to be established: (i) that there was a judicial decision; (ii) that the judicial decision was in fact pronounced; (iii) that the tribunal pronouncing the decision had competent jurisdiction to do so; (iv) that the decision was final, and (v) that the judicial decision was or involved a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised. I have adopted this convenient summary from SPENCER BOWER'S book RES JUDICATA.

The decision of the Lands Tribunal deals with the contentions on behalf of the valuation officer before him and those contentions were repeated with perhaps varying emphasis before us. The submissions were that there was and is no estoppel by record by reason of the judgment in personam of the local valuation court, because the proceedings there did not create a lis inter partes; the court was not a court of competent jurisdiction; the proceedings in 1951 were in respect of the then valuation list and could not apply to proceedings in respect of the new and different valuation list which came into force on Apr. 1, 1956; and that the court in 1951 had no jurisdiction to determine any question raised in 1956.

The society made its proposal in 1951 that it should be exempted from rateability under the Act of 1843 in accordance with the procedure for deciding such an issue if the valuation officer challenged the claim. The procedure is laid down in the Local Government Act, 1948, and in particular in s. 40, s. 41, s. 44 and s. 48. Section 44 (1), as amended, provides for a local valuation court to be convened

> "... for the purpose of hearing and determining appeals under the preceding provisions of this Part of this Act against objections to proposals for the alteration of valuation lists."

Then s. 48 (2) and (4) make certain provisions which I do not read as my Lord has already read them. Section 49 gives a right of appeal, now to the Lands Tribunal, to any person who appeared before a local valuation court on the hearing of an appeal and is aggrieved by the decision of the court.

I agree with the Lands Tribunal that the local valuation court was a competent court, constituted by the Local Government Act, 1948, to deal with matters in dispute such as arose here and that there was a lis inter partes. The only ground on which the society claimed exemption was that it was a scientific society within the terms of the Act of 1843. It was a question which required a careful judicial inquiry. It received it and a decision thereon from the appropriate court, whose decision was final subject to any appeal which in this case was not made.

The argument to the contrary was based on several authorities dealing with decisions of the Income Tax Commissioners. As the Lands Tribunal pointed out, the local valuation court is not an assessing authority, and he, in my view, rightly rejected these submissions of the valuation officer. But he has held that the principle of res judicata could not be applied to proceedings in respect

of a different valuation list than that in respect of which a decision had been given. Under present legislation, the ratepayers are confronted with the prospect of a new valuation list every five years. If the view appealed against is right, it would seem that, if it takes the greater part of five years (as well it might) for a ratepayer (or indeed for a valuation officer) to have the benefit of a decision in the House of Lords, then no sooner would this have been achieved than the whole question could be litigated again on the same material, steadily exhausting one quinquennial period after another.

I would reject the view that there can be no finality on any issue in rating unless authority restrains me. Instability and uncertainty seem to be as undesirable in rating as in any other factor affecting future planning and financing of the affairs of a trade, an organisation or an individual. A new valuation list provides the occasion for reviewing the entries of premises not only as to their values but as to exemptions and categories, such as industrial or freight-transport hereditaments. On the face of it, a value fixed in one year has to be regarded in a different setting both actually and relatively five years later, or even one year later, and in fact there would seem little scope for a plea of res judicata in respect thereof. Authorities were quoted, which learned counsel for the society did not challenge, to the effect that values or estimates could not be relied on by a plea of res judicata. In the days when a person aggrieved had to challenge a rate in order to air his grievance, an objection sustained or rejected one year could not be said to be res judicata in respect of a newly assessed rate for a subsequent year. The rate had to be estimated afresh each year and was clearly attackable as a new estimate. But the present issue seems to me not to be affected by a question of value or estimate. The society found itself placed on the new valuation list coming into force on Apr. 1, 1956. Its only claim for exemption was that it was a scientific society within the Act of 1843. The only issue which arose was whether the society was or was not so exempt. In an issue already tried between the same parties, in the court provided to hear such a dispute, it had been held that the society was within the Act in its purposes and activities, and in the occupation and user of the premises and was entitled thereby to exemption from rates. The matter is therefore, as I see it, res judicata between the parties involved in that dispute unless circumstances have changed. This preliminary point arises on the basis that circumstances have not changed and, in my opinion, the question cannot be litigated further, even if the decision, if reviewed, might be held to be wrong.

Counsel for the valuation officer relied mainly on the following three cases: *Leith Harbour & Docks Comrs.* v. *Inspector of the Poor* (1), *R.* v. *Hutchings* (2), and a case in the Privy Council, *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (3). In the *Leith Harbour* case (1), the relevant part of the headnote is as follows:

> " Res Judicata:—That the court has decided against a poor rate for one year, is no reason why it should not decide in favour of a poor rate for another and a different year, in respect of the same property, and in a suit between the same individuals. The doctrine of res judicata does not apply to such a case ",

and the valuation officer relied in particular on the speech of LORD CHELMSFORD. But the speech of LORD CRANWORTH, L.C., on the point was as follows:

> " There remains the single point of res judicata, which, I think, will appear

(1) (1886), L.R. 1 Sc. & Div. 17.
(2) (1881), 45 J.P. 504; 6 Q.B.D. 300.
(3) [1926] A.C. 94.

to your Lordships to be more plausible than substantial. Some ten or eleven years ago the question was raised as to the liability of the commissioners of this very harbour to contribute to the rate for the year from Whit-Sunday, 1846, to Whit-Sunday, 1847. They denied liability; and pleaded, amongst other things, that 'The subjects were held by them solely and exclusively for the benefit of the public; and further, that the rates and revenues leviable being by law limited and appropriated to the maintenance and repair of the harbour, and the liquidation of the debt incurred in the construction of the works, they were not liable for the assessment'. That case, however, turned, as appears by Mr. Macqueen's report of it, on a totally different point. And the affirmance of a part of the decision below, so far as it was affirmed, had reference not to the general question of rateability, but solely to the payment to be made for a particular year. Care, however, was taken by the House to guard itself from expressing any opinion as to the general question of the rateability of harbours and docks."

The earlier case on which reliance had been placed is inserted in the report at p. 21 and it reveals that both LORD CRANWORTH, L.C., and LORD BROUGHAM made it clear that the judgment of the House should be so drawn up as not to prejudice the parties with respect to any rate that might be imposed thereafter. I do not think this case is helpful and certainly not conclusive in the present dispute, both because the earlier decision could not in its terms be relied on and on the general ground that the appeal had been against the rate for a given year.

In *R.* v. *Hutchings* (1) this court held that the adjudication of justices that a street was a highway repairable by the inhabitants at large on the first application was beyond the jurisdiction of such justices, which was only to make or refuse the order for the expenses claimed, and that therefore such adjudication on the first application did not estop the local board from claiming the expenses that they claimed on the second application. That statement from the headnote seems accurately to state the decision of LORD SELBORNE, L.C., who presided and gave the only judgment of the court.

In the present case no question of the court's jurisdiction to try the issue in 1951 or whether its judgment was directly on the point or not has arisen, or could arise, and I fail to see that *R.* v. *Hutchings* (1), strongly relied on by counsel for the valuation officer, has any application. In the prior court LUSH, J., on the basis that the decision was within the justices' jurisdiction, had held that the defendant was entitled to the benefit of the estoppel claimed by him. The effect of *R.* v. *Hutchings* (1) was dealt with in *Wakefield Corpn.* v. *Cooke* (2), and treated as a case where the justices clearly had no jurisdiction. The *Wakefield* case (2) itself turned on the conclusiveness of a judgment in rem. In *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (3), a question which had arisen as to the method of ascertaining the average annual value of a mine was held not res judicata by a decision of the High Court of Australia between the parties to the valuation for a previous year. LORD CARSON, who delivered the judgment of the Judicial Committee, in dealing with the estoppel point said:

"It was also contended before this Board on behalf of the respondents that having regard to the said decision of the High Court of Australia the question raised by this appeal is res judicata as between the appellants and

(1) (1881), 45 J.P. 504; 6 Q.B.D. 300.
(2) 68 J.P. 225; [1904] A.C. 31.
(3) [1926] A.C. 94.

the respondents, and the appellants are estopped from contending that such decision of the High Court of Australia is wrong. It has been pointed out that no such question was raised or pleaded either before the district court or the Supreme Court in New South Wales, nor has there been any adjudication or finding upon it. There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely, the valuation for a different year and the liability for that year. It is not eadem questio, and therefore the principle of res judicata cannot apply."

In the same volume of reports, another Australian case, *Hoystead* v. *Taxation Comr.* (1) is reported. There, in a judgment delivered by LORD SHAW, the Judicial Committee held that the commissioner was estopped since, although in previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision then given. LORD WRIGHT cited those two Privy Council cases in *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* (2), and said it was not necessary to decide between the judgments if they conflicted or to reconcile them if they merely seemed to conflict. I think the facts here are different from and clearer than those in either of the Australian cases cited (*Broken Hill* case (3) and *Hoystead's* case (1)). The issue in the present case was not only fundamental; it was the only issue in the appeal to the local valuation court in 1951, and was in no way dependant on any admissions.

Hoystead's case (1) was concerned with taxation and not rating, but I would apply its reasoning to the present case and would regard it as the most relevant of all the authorities cited to us, especially as taxation is a matter of annual assessment and therefore periodic as is rating. The full court in Australia had held in respect of the financial year 1918-19 that the trustees of the will were entitled to make this deduction of £5,000 from the assessment of liability to taxation as the six beneficiaries were joint owners within certain sub-sections of the Land Tax Assessment Act. LORD SHAW continued:

"Matters were allowed to rest upon this footing for another year. And then, in the subsequent year, the whole matter was reopened by the action of the Commissioner of Taxation who, in respect of the same estate and the same parties, reverted to the position that the taxable value should not be six sums of £5,000 as decided in the former case, but one sum of £5,000. To this it was answered, to put the matter briefly, that the former decision was right upon its merits, but that whether so or not, the respondent was estopped by the judgment already pronounced. If this argument be sound there is an end of the case; and it will be unnecessary to enter upon the merits of the difference between the parties upon the construction of the statute. In the opinion of their Lordships the contention of the appellants is sound, and the respondent is estopped by judgment."

Then LORD SHAW says:

"As to the amount of deduction to be made under the Act, being either six sums of £5,000 or one sum of £5,000, the former litigation settled six;

(1) [1926] A.C. 155.
(2) [1938] 4 All E.R. 747; [1939] A.C. 1.
(3) [1926] A.C. 94.

the judgment under appeal settled one. There is accordingly between the same parties in regard to the same property a definite prescription of deduction from assessable values. The Board is of opinion that that prescription was as conclusively settled in the former litigation as language could settle it, it having been 'How many deductions of £5,000 the respondent should make?' and the judicial answer being 'six'. Apart from the other arguments and the authorities to be presently alluded to, the case appears thus to be concluded in favour of the appellants. Very numerous authorities were referred to. In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle—namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

Then the noble Lord referred to some of the cases of outstanding authority, and went on:

> "It is seen from this citation of authority that if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding."

Inland Revenue Comrs. v. *Sneath* (1), to which reference was made in the argument, does not seem to be relevant, except for an interlocutory observation by GREER, L.J., who said:

> "I should feel difficulty if the Special Commissioners was a court of competent jurisdiction in saying that there was not here an estoppel."

The decision was that the commissioners' determination was not lis inter partes of a competent court so as to create an estoppel per rem judicatam.

The valuation list giving rise to consideration of the issue was new and the time for applying the decision was different. It seems to me that such sort of considerations would normally arise when the plea of estoppel per rem judicatam is raised. The question is whether the matter in issue is the same. I would hold it to be precisely the same, namely, whether or not the society is qualified as a scientific society to exemption from rating under the Act of 1843. That is the res, the only issue on which the society can justify its exemption. If on the same facts the local valuation court were to find contrary to its 1951 decision, there would be two conflicting decisions of the same court in litigation between

(1) [1932] All E.R. Rep. 739; [1932] 2 K.B. 362.

the same parties on the same subject-matter, the only difference being an interval of a few years.

It is not even suggested that any decision of the courts had intervened which, if the question can be reviewed, would or might invalidate the first decision. But, even if there were such an authority, it would not defeat the plea of estoppel. In *Re Waring, Westminster Bank, Ltd.* v. *Burton-Butler* (1) JENKINS, J., held that the decision (i.e., the decision relied on as res judicata) was a decision that annuities must be provided for as annuities of twenty twenty-ninths of the full amount thereof so long as tax continued at 10s. in the pound. It has been overruled, or, in other words, has been held to be wrong in law and not to be followed in other cases, but it is nevertheless a subsisting order which is binding on the parties to the proceedings in which it was made.

With deference to my Lords and to Mr. ERSKINE SIMES, Q.C., whose view they approve, I do not think that the distinction which they find between *Hoystead's* case (2) and the present holds. The question in *Hoystead's* case (2) was the assessment for tax in a given year. The tax commissioners were held estopped from adopting a different method for that year in a certain matter of allowances in arriving at their assessment than that which had been decided between the parties in the course of litigation two years earlier. In the present case the valuation officer has to prepare a list of those premises which are liable to rating for the given period. In so doing he is estopped from saying that the society is not a scientific society within the meaning of the Act of 1843 and entitled to the benefits the Act gives them, because that precise issue has been decided. The society claims no greater or other estoppel.

I would allow the appeal and would hold, in answer to the question asked, that the Lands Tribunal did not come to a correct decision in law in rejecting the contention of the society set out in para. 3 of the Case.

WYNN-PARRY, J. (read by MORRIS, L.J.): I am of opinion that, for the purposes of considering whether the doctrine of res judicata applies in this case, first, the local valuation court is a court of competent jurisdiction, and, secondly, the contention between the parties whether or not the society is entitled to exemption from liability to be rated in respect of the hereditament in question under s. 1 of the Scientific Societies Act, 1843, is a lis inter partes, as regards the society and the respondent valuation officer.

Counsel for the society contended that the decision of the local valuation court in 1951 on the construction of the memorandum of association of the society is, as he put it, a constant factor, and that, therefore, by reason of this decision of the local valuation court in 1951, the society, so far as concerns the construction of its memorandum of association, must, when the new valuation list came to be considered in 1956, be held to be still within s. 1 of the Scientific Societies Act, 1843.

I agree with MORRIS, L.J., that this is not a sound contention, but, even if it were, it could not conclude the matter: there are other conditions set out in s. 1 which must be fulfilled before the benefit of the section can be claimed. It must be shown inter alia that the premises are occupied by the society for the transaction of its business and for carrying into effect its purposes. The society may fulfil that condition at one given point of time but fail to do so at another. The question whether or not it does so at any given point of time is wholly a question of fact.

(1) [1948] 1 All E.R. 257; [1948] Ch. 221.
(2) [1926] A.C. 155.

The effect of s. 34 of the Local Government Act, 1948, as amended, is that a new valuation list must be prepared every five years by the valuation officer. It is clearly an essential part of his duty to consider the position as regards all premises within his area as they exist at the time of making his list. In 1951, having considered the circumstances as they then existed, he entered the society in the 1951 valuation list on the basis that it was liable to be rated. The local valuation court took the view that in the existing circumstances the society fulfilled all the conditions set out in s. 1 of the Scientific Societies Act, 1843, and was, therefore, exempt, and the valuation list was accordingly amended. In 1956 a new list had to be prepared, and for that purpose the circumstances then obtaining had to be ascertained, because, as I have pointed out, the society might have ceased to fulfil one or more of the conditions set out in s. 1.

It matters not, to my mind, what is the result of the investigation into the circumstances obtaining in 1956: it may be found that the society fulfils all the conditions in s. 1, or it may be found that the society has ceased to fulfil one or more of the conditions in that section. The vital point is that the investigation has to be made. To my mind the inevitable result of the necessity to make the investigation is that the res which was brought into existence in 1951 becomes exhausted. If, as a result of the valuation officer inserting the society in the new list as liable to be rated, the society makes a proposal for exemption, a new issue arises between the parties which has to be resolved. It matters not whether it is resolved by the local valuation court after evidence has been adduced by the valuation officer or whether it is resolved without any evidence being adduced by him. The important and, to my mind, the decisive point is that the new issue has to be resolved.

Now, if this reasoning be right, it must follow that a decision of any court on a particular list can only bind the parties at most during the currency of that list. The local valuation court proceeded on the basis that there was not shown to be any change of circumstances between 1951 and 1956. It therefore decided that the hereditament should be marked "exempt". In doing so, it must be taken not to have applied the doctrine of res judicata, but merely to have followed its own previous decision.

As regard the authorities, the only one which at first sight appears to support the society is *Hoystead* v. *Taxation Comr.* (1), a decision of the Judicial Committee of the Privy Council. In my view, that case is to be distinguished from the present case; and in order to point the difference, I do not think that I can do better than quote from the decision of Mr. ERSKINE SIMES, Q.C., in the Lands Tribunal:

> "The distinction between that case and the one now under consideration seems to me to lie in the fact that the statute then in question was one which prescribed the method in which an assessment was to be made and it was the method which was called in question again in the subsequent case, whereas in the present case the question is whether the respondent society should be entered in the list which came into force in 1956 with gross and rateable values or as exempt and no decision as to how it should be so entered in the list has ever been decided."

I also agree with what follows:

> "The point at issue in the present case is not dissimilar to that raised in *Leith Harbour & Docks Comrs.* v. *Inspector of the Poor* (2) and the dictum of

(1) [1926] A.C. 155.
(2) (1886), L.R. 1 Sc. & Div. 17.

LORD CHELMSFORD [therein] ' . . . it is sufficient to say that the proceeding in the present case being for a different rate from that upon which the former judgment proceeded, the cause of action is different, and the plea of res judicata is consequently inapplicable ' seems to me to apply to a case where there is a different valuation list."

I, therefore, conclude that the doctrine of res judicata is inapplicable in this case, and that the decision of the Lands Tribunal was correct.

Appeal dismissed.

Solicitors: *Hillearys; Solicitor of Inland Revenue.*

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND ASHWORTH, JJ.)

February 4, 1959

NICHOLSON *v.* GLASSPOOL

Street—Use of obscene language—Annoyance—No direct evidence of any person being annoyed—Inference of annoyance.

On a charge of an offence against a bye-law prohibiting the use of obscene language in a street to the annoyance of a person therein, where there is evidence that the defendant spoke audibly and that the nature of his language was obscene and calculated to annoy, justices are entitled to infer annoyance and convict, even though no positive evidence of any person having been annoyed was called by the prosecution.

CASE STATED by Yorkshire (West Riding) justices.

An information was preferred at Otley Magistrates' Court by the respondent Glasspool, a police officer, charging the appellant, Edward Alfred Nicholson, with using obscene language in a street to the annoyance of a person therein, contrary to one of the bye-laws of the West Riding of Yorkshire for good rule and government. Evidence was given before the justices of the use of obscene language by the appellant in a busy street. No evidence that any person was annoyed was offered by the prosecution; but after it had been submitted by the defence that there was, in consequence, no case to answer, the justices permitted the recall of the police constable who charged the appellant, who said that he had been very annoyed. The justices were of opinion that they were entitled to infer that the police constable and others there were annoyed, and that it was not necessary to adduce direct evidence. They convicted the appellant, who appealed.

R. St. George Calvocoressi for the appellant.

H. C. Beaumont for the respondent.

LORD PARKER, C.J.: This is a Case Stated by justices for the West Riding of Yorkshire, before whom the appellant was convicted of an offence against one of the local bye-laws, the relevant words of the bye-law being:

> " No person shall, to the annoyance or interruption of any person passing along or being in any street or public place make use of any violent, abusive . . . indecent or obscene language."

It raises a point which is constantly coming before these courts with regard to what is necessary to be proved in order to prove the offence of doing something, be it making a noise or using language, so as to cause annoyance to somebody.

At seven o'clock one evening in May, 1958, the appellant was standing in a street close to the Bay Horse Hotel, Otley, outside a public lavatory, apparently offering to fight with other persons. In the course of his remarks to persons in the street he said: "I am no c—. I will have a f— go". There was a police officer present who reported the matter, and the appellant was summoned for contravening the bye-law. At the hearing evidence was called and the justices found not only that he addressed that remark to persons in the street, but that at the time there were many people passing the place where he was standing. At the close of the case the solicitor for the appellant submitted that the prosecution had not proved their case in that the evidence of no specific person had been called to say that he had been annoyed by those remarks. In my judgment, the justices acted perfectly properly, and I am glad to say that that point which, in my judgment, is a palpably bad point, did not influence their decision. They found that as a matter of inference the words were calculated to annoy persons in the street and that there were people passing in the street who would in the ordinary way hear the words used. They thought that was enough, but as a matter of caution they did at a later date, the matter having been adjourned, allow the police constable to be recalled to say that he, at any rate, had been annoyed.

That has given rise to another matter of appeal, namely, that they ought not to have heard that evidence once the prosecution case was closed. At the time when the justices decided that case, they had not had before them—they could not have had because it had not been decided—*Raymond* v. *Cook* (1), which was heard by this court last sittings. That case concerned a musical instrument on an ice cream vendor's cart, and in the course of my judgment I said:

> "The proper approach to these cases is for the justices to ask themselves first: Was the noisy instrument so noisy as to be calculated to annoy?"

Perhaps I should have said: Was the noisy instrument so noisy and of such a nature as to be calculated to annoy? Then I went on:

> "On that, the facts may speak for themselves, or it may be necessary for them to hear evidence, albeit of only one person; but once they have come to the conclusion that the noise was calculated to annoy, then it is quite unnecessary for them to have any evidence as to who and how many people were in fact annoyed."

Counsel for the appellant has contended that there is a real difference between noise and language. The way he puts it is that noise is an annoyance itself, whereas whether language annoys or not depends on many ingredients, including in particular the susceptibilities of the people who hear it. I can see no distinction between this case and *Raymond* v. *Cook* (1). There was abundant evidence here that the language used was not used in a whisper. It was addressed to the persons in the street, and it was clearly by its nature such as to annoy. That being so, the justices were entitled to infer, as they did, that passers-by were annoyed, and, accordingly, it was unnecessary for them to hear the evidence of anyone, the constable or anyone else, as to whether they or he were in fact annoyed. In my judgment, this is a hopeless appeal.

DONOVAN, J.: I agree.

ASHWORTH, J.: I agree.

Appeal dismissed.

Solicitors: *Stitt & Co.*, for *Newstead & Walker*, Otley; *Cummings, Marchant & Ashton*, for *R. C. Linney*, Wakefield.

T.R.F.B.

(1) 123 J.P. 35; [1958] 3 All E.R. 407.

COURT OF APPEAL

(JENKINS, SELLERS AND PEARCE, L.JJ.)

February 4, 1959

GUINNESS TRUST (LONDON FUND) *v.* WEST HAM CORPORATION

Rating—Relief—Charitable organisation—"Conducted for profit"—Trust for provision of workmen's dwellings—Rents to be such as to increase the fund—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

A trust fund was made applicable to "the amelioration of the condition of the poorer classes of the working population of London and of their modes and manner of living, by the provision of improved dwellings" and in other ways. The trust deed provided, inter alia, "that the original capital of the fund should, by expenditure on objects of a permanent character returning a fair low rate of interest, be kept intact and go on increasing". The trustees, accordingly, invested the fund in dwellings which they let to poor working people at rents calculated, so far as the Rent Acts would allow, to realise a net income, after allowing for all outgoings, of three per cent. on the capital. This income was applied in acquiring additional properties and expanding the work of the trust, and was not, and could not, be distributed.

HELD: the words "not established or conducted for profit" in s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, meant not established or conducted for the purpose of making profit or with the object of making a profit, and did not extend to every organisation which in any circumstances or at any stage in its activities received something which might be considered in itself to constitute a profit; the present trust was established for the purpose of ameliorating the condition of the poorer classes, and its object was, therefore, charitable; the making of the profit was merely part of the machinery by which the trust achieved charitable purposes; and, therefore, the trust was not established or conducted for profit and was entitled to rating relief under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Decision of Divisional Court, (1958), 122 J.P. 317, reversed.

APPEAL by the ratepayers against a decision of the Queen's Bench Divisional Court (122 J.P. 317), on a Case stated by the recorder of West Ham, that they were not entitled to rating relief under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Pennycuick, Q.C., and *Widgery, Q.C.*, for the ratepayers.

Harold Williams, Q.C., and *Rippon* for the rating authority.

JENKINS, L.J.: In this case the ratepayers, a charitable body known as the Guinness Trust (London Fund) Founded 1890 Registered 1902 claimed with respect to premises occupied by them and known as the Working Persons Hostel and Premises in John Street, West Ham, the benefit of the provisions in regard to rating contained in s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The respondents, the county borough of West Ham, as rating authority, rejected that claim, and the ratepayers appealed to quarter sessions. The case was heard by the learned recorder, who by his order of June 3, 1957, allowed the appeal. At the instance of the respondent rating authority the learned recorder stated a case for the opinion of the Queen's Bench Division, and by a judgment dated Apr. 22, 1958, the Queen's Bench Divisional Court allowed the appeal, and held that the ratepayers were not entitled to the benefit of s. 8. From that judgment the ratepayers now appeal to this court.

In order to succeed, the ratepayers must bring themselves within the terms of s. 8, and I should next refer to sub-s. (1) of that section, which is the only part of it with which I need trouble. Section 8 (1) is in these terms:

" This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

The next two paragraphs of the sub-section are not directly material, but I should perhaps refer to them. They are:

" (b) any hereditament held upon trust for use as an almshouse; (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field."

Then there is a proviso with which I need not trouble. The directly relevant provisions are those contained in para. (a) of sub-s. (1) of the section.

The trust deed whereby the Guinness Trust was constituted is annexed to the case stated by the learned recorder. It is a deed dated Feb. 4, 1890, and it constituted the Guinness Trust as an ordinary unincorporated trust, but the Charity Commissioners incorporated the trustees as a charitable body by an order dated Feb. 28, 1902, and from that time they have been a corporate body with the title now appearing on the record, Guinness Trust (London Fund) Founded 1890 Registered 1902. The trust deed of Feb. 4, 1890, was made between Sir Edward Cecil Guinness, thereinafter sometimes called the founder, of the one part, and the trustees therein named, of the other part, and it contains these recitals:

" Whereas the said Sir Edward Cecil Guinness, having long felt the gravity of the evils which result from the insanitary and insufficient accommodation supplied to large numbers of the poorer of the working classes, in the dwellings now inhabited by them, on Nov. 18 last addressed a communication to the trustees requesting them to undertake the administration of a fund amounting to £200,000, which he proposed to establish with the object of endeavouring in those and other respects to ameliorate the condition of the labouring poor of London.

" And whereas, whilst defining the general lines on which the fund should be applied, it is the intention of the founder that very wide discretion should be left to the trustees as to the mode of application and management, in the expectation that by economical and wise administration the benefits of the fund may be brought within the reach of many who are unable to avail themselves of the advantages offered by existing organisations, and with the hope that, should his expectation in this respect be fulfilled, the success of the experiment may lead to other efforts in the like direction."

Then there is a recital as to the particulars of the investments transferred to the trustees; they had a total value at that date of £200,000. I can now go to the operative part. Clause 1 (A), to which there is a sidenote " Objects of the Trust ", is in these terms:

" 1 (A) The objects to which the fund shall be applicable are declared to be: The amelioration of the condition of the poorer classes of the working population of London and of their modes and manner of living, by the provision of improved dwellings; by giving them facilities, should the trustees think it desirable in any or all cases to do so, for obtaining means

of subsistence and the necessaries and decencies of life; and by such other means as the trustees may in their uncontrolled discretion think fit."

Then sub-cl. (B), round which the main controversy in this case has centred, is in these terms:

"Without restricting the interpretation in the widest sense of the objects as before defined, it is the intention of the founder that the original capital of the fund should, by expenditure on objects of a permanent character returning a fair low rate of interest, as far as possible, be kept intact and go on increasing, so that, whilst payments of money in the nature of gifts or not returnable by the recipients are not precluded, the purpose to be kept in view may be assistance to individuals to improve their condition, without placing them in the position of being the recipients of a bounty."

I can omit sub-cl. (C) of cl. 1 and pass to cll. 2 and 3:

"2. The administration of the fund will be vested in the trustees, and shall be carried out by them so as to give the fullest effect to the objects hereinbefore declared. The mode of application shall be from time to time determined by the trustees in their uncontrolled discretion. 3. The following modes of application are declared to be within the meaning of the trust, but they are mentioned by way of example and illustration only, and not so as to fetter or restrict the trustees' discretion, or render it incumbent on them to adopt them or any of them, unless they shall think fit so to do."

Then sub-cl. (A) of cl. 3:

"The acquisition of land, with or without buildings thereon, in London, and the provision, erection, adaptation, or improvement, of buildings for the purposes of:—(1) Dwellings to be let out in tenements to the poorer classes of the labouring population, in crowded neighbourhoods, or in places of easy access to the centres of labour, with power in the latter case, if deemed expedient, to make arrangements with railway and other companies or otherwise for cheap means of transit. It is the desire of the founder that the rents of such tenements may, if practicable, be fixed on such basis as to make them accessible to those of the poorer of the working classes, whom it is his desire to attract from the crowded and insanitary tenements which they now inhabit. Any part of such premises may be used for shops, or for any other purposes which the trustees may determine. (2) Common and other lodging houses. (3) All or any matters, things, and conveniences for any and every purpose, tending, in the opinion of the trustees, to the convenience, health, comfort, moral welfare and improvement of their tenants and their families, and others whether tenants or not."

Then I think the only other provision to which I need refer is cl. 3 (D):

"The contribution towards, support of, or provision or subscription of capital for any company, institution, or private or public undertaking or trust formed, or to be formed, either for purposes of profit, or without profit, having objects analogous to any of the objects of the present trust, with or without reserving any control over the application or administration of the funds contributed."

I should mention, without reading them, that the provisions of cl. 4 give the trustees wide powers of administration and management.

Such being the objects of the Guinness Trust (London Fund), it is common ground that the ratepayers fall within the second requirement of s. 8 (1) (a) of the Act of 1955 in that the main objects of the trust are charitable. The

matter in dispute is whether the trust also qualifies under the first requirement, that the organisation concerned is not established or conducted for profit. The requirements are: "any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit . . ."—that is the first requirement—" and whose main objects are charitable "—that is the second requirement. The second requirement is admittedly complied with, the contest being on the question whether the first requirement, that the organisation in question shall not be established or conducted for profit, is also satisfied.

Passing to the Case Stated, in para. 2 the learned recorder says that having heard the appeal on Apr. 15, he gave judgment on June 3, 1957, and he found the following facts proved or admitted:

> " (a) The ratepayers were an organisation whose main objects were charitable. (b) The ratepayers were established in 1890 by a deed of trust and were incorporated by order of the Charity Commissioners in 1902. Their activities consisted in the main of providing houses for ' people who are not well-to-do '."

Then there is a reference to an action to which the Guinness Trust was a party, which I think has no bearing on the present dispute. The Case continues:

> " Out of the rents received substantially from these houses they enjoyed an annual gross income in the sum of £150,000. Their policy had been, after allowing for all outgoings, to realise a nett income of three per cent. on their capital which was applied in acquiring additional properties and expanding the work of the trust. This policy, however, the operation of the Rent Acts had long prevented them from attaining and in 1949 and 1954 they actually sustained a loss of over £2,000 in each year. However, during the years 1946-55 their average profit was some £9,150 and they were now once again on a sound financial footing. (c) Their original capital fund amounted to £200,000 which had been increased by the end of 1955 to something of the order of £1,500,000. (d) A copy of the said deed of trust is attached hereto and forms part of this case. (e) The trustees had never made any contribution to another organisation pursuant to cl. 3 (D) of the said deed of trust."

Then he gives the figure of the rateable value of the premises in (f) and continues:

> " 3. The sole issue before me was whether or not the ratepayers were ' established or conducted for profit ' within the meaning of sub-s. (1) of s. 8 of the Act."

Then he sets out the contentions of the ratepayers and the rating authority respectively and states his opinion thus in para. 7:

> " I was of the opinion that (1) if it is shown that the ratepayers' organisation was not established for profit, the question whether or not it is conducted for profit does not arise. (2) ' Established for profit ' means established for the purpose of profit. (3) The crucial question which I therefore had to determine was What was the real purpose for which the ratepayers were established and was that purpose the making of profit or something else? (4) For the purpose of determining that question regard must be had to the objects for which the ratepayers were established as laid down in the said deed of trust. (5) Profit, while contemplated by the said deed, was entirely incidental to the objects of the trust. (6) The ratepayers' organisation is not established or conducted for profit . . ."

Accordingly, he held that the appeal must succeed.

Before passing to the judgment of the Divisional Court I may perhaps conveniently refer to the reports of *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (1) in the Court of Appeal and in the House of Lords. The Court of Appeal decision was delivered on July 30, 1957, and it was available to the Divisional Court. The case had not been heard in the House of Lords at the time of the Divisional Court hearing. The case concerned an organisation of a very different kind from the one with which we are here concerned, but expressions of view were given in the Court of Appeal and in the House of Lords which appear to me to afford substantial support to the contention of the ratepayers in this case. So far as the report in the Court of Appeal is concerned, I would refer to the observations of PARKER, L.J., in delivering the judgment of the court. The learned lord justice said:

> " We will deal first with the question whether the ratepayers' organisation is established or conducted for profit. It conducts mutual insurance among its members and in carrying on that activity it has accumulated very considerable reserves in the form of investments in securities and in land. Indeed we think that if that activity is properly conducted, the accumulation of such reserves is not only inevitable, but a necessity. From time to time, when those investments are sold, profits are made and the income and rents obtained are also in the nature of profits. The organisation accordingly does earn profits from which the members benefit, but that as it seems to us is a very different thing from being established or conducted for profit. In our judgment the earning of profits is purely incidental, and it cannot be said that the organisation is established or conducted for profit. It carries on no ' business ' for the purpose of earning profits, cf. *R.* v. *Whitmarsh* (2). The appellants accordingly comply with the first condition."

They were, however, held not to comply with the second condition, and, accordingly, could not qualify for the exemption. The decision of the Court of Appeal was upheld in the House of Lords and I should read some passages from the speeches. LORD KEITH of AVONHOLM said this:

> " The society may, I think, quite properly be described as a mutual insurance organisation set up to provide benefits for its members in the various mischances of illness, disability and old age that may befall them during membership, and to afford them an opportunity of taking out whole life assurances, endowment assurances and old age annuities for themselves, and certain other defined types of insurance. A man might, in a sense, provide similar benefits for himself without joining any society by setting aside and investing a lump sum, or annual amounts, to accumulate with interest and to provide a nest egg against some emergency, or contemplated event, although such a scheme would be inadequate against unexpected early illness or death. The interest earned would necessarily be subject to tax but it could not, in my opinion, be said that he was engaged in earning a profit, or in setting up a profit-earning scheme. The accumulated sum is capital belonging to the person concerned. There are obvious advantages in joining with some 700,000 others to provide against such contingencies on a mutual basis and the mutual organisation does not take on the character of a profit-making organisation by the mere addition of numbers. This was, in my opinion, the ratio of the decision of this House in *New York Life Insurance Co.* v. *Styles* (3), which is, I think, conclusive on this point."

(1) 121 J.P. 567; [1957] 3 All E.R. 199; [1957] 2 Q.B. 573; *affd.* H.L., post, [1958] 2 All E.R. 601.
(2) (1850), 15 Q.B. 600.
(3) (1889), 14 App. Cas. 381.

So far the learned Law Lord was, as I understand his observations, dealing with the question of mutuality and holding that the case was concluded from that point of view by *New York Life Insurance Co.* v. *Styles* (1). Then he continued with these further observations:

> "The Court of Appeal thought that profits, or something in the nature of profits, were earned by the society for its members, but that this was purely incidental to the purpose for which the society was formed, and that it could not be said that it was established or conducted for profit. It may well be that, on change of its investments, the society on some occasions realised a capital appreciation just as on other occasions it may have suffered a capital loss. But it was not trading in its investments, and the position in the case of this mutual society does not seem to me to be different in any way from what it would be in the case of a single individual. The society holds very large investments which earn large sums of interest and rents. These are, no doubt, profits and gains for the purpose of the Income Tax Acts but, in my opinion, the existence of these investments does not make the society an organisation established or conducted for profit within s. 8 of the Act of 1955. If it were otherwise, many charitable organisations holding investments would be cut out of the benefit of the section."

Then LORD MACDERMOTT said this:

> "Of these requirements, the first is clearly satisfied. The second has been a matter of controversy throughout the litigation, but quarter sessions found, and the Court of Appeal held, that the society was not established or conducted for profit. As at present advised, I am not disposed to differ from that view, but I do not need to express a final opinion on it and I shall, therefore, refrain from doing so and proceed on the assumption that this condition, too, is fulfilled."

He then goes on to consider the other branch of the section. It will be seen that while not expressing any concluded opinion, he said that as then advised he was not disposed to differ from the view of the Court of Appeal on the question whether the society was established or conducted for profit. LORD SOMERVELL OF HARROW concurred in the opinion which had been delivered by LORD KEITH, and LORD DENNING said:

> "I have no doubt that this society was not 'established' for profit. Like other friendly societies it was, no doubt, established to encourage thrift among people of small means. Rule 2 (1) shows that its object was to enable its members, by the pooling of their contributions, to establish a common fund or funds, out of which they would receive relief during sickness . . . Looking at the way in which the society has conducted its affairs, I am of opinion that it has made profits. It has not distributed those profits like a commercial company. Nor has it returned them to members. It has used them to build up large and accumulating reserve funds. But the fact that the society has made profits does not mean that it is 'conducted for profit', which I take to mean 'conducted for the purpose of making profit'. Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects."

(1) (1889), 14 App. Cas. 381.

I think that those are all the passages to which I can usefully refer, and notwithstanding the difference between the two cases, they fortify me in the view that "established or conducted for profit" in s. 8 (1) of the Act means established for the purpose of making profit or conducted for the purpose of making profit, and does not extend to every organisation which in any circumstances or at any stage in its activities receives something which might be considered in itself to constitute a profit.

The Divisional Court took a different view and I should next read some part of their judgments. The leading judgment was delivered by LORD GODDARD, C.J., and he said:

"It is clear that what Sir Edward Guinness desired was that this sum of £200,000 should be administered by the trustees in erecting buildings and letting them to tenants at such a low rent as would enable the trust to maintain the buildings and to accumulate funds; the settlor hoped and desired that more buildings of this nature would be put up either by his trustees or other like-minded charitable people, so that the dwellings of the poor of London would be very largely increased. That was the object of the trust; and I have read the direction to the trustees. The trustees are therefore to invest their money in buildings charging rents which will yield a low rate of interest. That is a profit and the profit will be accumulated and used for the purpose of acquiring for the benefit of the trust other buildings or erecting other buildings, though not for the personal profit of any member of the trust, still less of the settlor . . . Let it be assumed, as I think it may properly be assumed, that the Guinness Trust is not established for profit in the sense that that is not the object of the trust. It is, however, to be conducted for profit and exists in order that there may become an accumulation of funds which will enable the trustees to invest in other buildings and thus increase the benevolent objects which the settlor had in mind. The rating authority is not, it seems to me, concerned with more than whether the conduct of the business is for profit, and here it is for profit. It is for other objects, no doubt, but it is conducted for profit. The clause which I have read distinguishes this case, if distinction is needed, from *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (1), to which we have been referred, which shows that if a profit is being made the rating authority is not concerned with what is done with that profit. The rating authority does not have to consider whether the profit is used for charitable purposes or whether it is used for any other purpose . . . I will assume that the organisation is not established for profit, but in my opinion it is conducted for profit, because it is making profits and its object is making profits for the purposes that I have indicated; and, in my opinion, although its main objects are charitable it is not entitled to the benefit of the section. The appeals must be allowed."

Then HILBERY, J., said:

"The difficulty in the way of the Guinness Trust seems to me to be in the terms of the deed which created the trust. It is conceded that under that deed the main object for which it was established is charitable, but the question arises whether it is also conducted for profit. I find it difficult to escape from the express terms of cl. 1 (B) which has been read by my Lord because there the founder of the trust expressed himself thus [then he read cl. 1 (B) and continued:] In my view the fair interpretation of that is

(1) 121 J.P. 567; [1957] 3 All E.R. 199; [1957] 2 Q.B. 573; *affd.* H.L., post, [1958] 2 All E.R. 601.

a direction to the trustees so to conduct the affairs of the trust as to produce a profit, which will if possible increase the fund available for the charitable purposes. That is conducting for profit. That distinguishes the case from the decision of the Court of Appeal on which counsel for the respondent placed great reliance, *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (1), because the words of PARKER, L.J., on which particular stress was laid were these: 'The organisation accordingly does earn profits from which the members benefit, but that as it seems to us is a very different thing from being established or conducted for profit. In our judgment the earning of profits is purely incidental, and it cannot be said that the organisation is established or conducted for profit.' In my view, if the facts were that in this case the trustees had, merely incidental to the discharge of the trust, so to invest money as to increase the amount available for charitable purposes the case would come immediately within the reasoning of that judgment, but that is not the case here. It is not that incidentally or fortuitously these profits have been made by the trustees. They have been made pursuant to the direction given to them about the affairs of the trust under the trust deed in cl. 1 (B) which I have read."

DONOVAN, J., agreed and he said this:

"It seems to me that all that the learned recorder thought he had to decide here was whether the trust was established for profit, and if he decided it was not then he had automatically to decide that the trust was not conducted for profit. I think that is clearly wrong. There are two separate conditions in the section both of which must be satisfied before there is a claim for relief. I merely venture to repeat what I said in argument to counsel for the respondent in connexion with the judgment of PARKER, L.J., about the concern being conducted for profit. Where a concern simply invests its reserves in order to get a return until the reserves are required for the business, it is natural to say that in so investing its reserves the concern is not merely on that account conducting its affairs for profit. It is otherwise where the whole business is to make investments and so earn a profit, whether the investments be in stocks and shares or in dwelling-houses."

I find it impossible to accept the views expressed by the Divisional Court. Returning to the deed of trust itself, it appears to me abundantly plain that the objects of the fund are set out in cl. 1 (A) and that para. (B) of cl. 1 is an ancillary provision which does not restrict what has gone before or, to use the exact words, "without restricting the interpretation in the widest sense of the objects as before defined". It states the intention of the founder without narrowing the foregoing objects, nor, as I see it, obliging the trustees to adopt the policy that the founder recommended. In my view, as I have said before, the words "not established or conducted for profit" mean not established or conducted for the purpose of making profit or with the object of making a profit. If that is right, then clearly it appears to me that the ratepayers are entitled to succeed in this case. If one does not introduce some word indicative of object or purpose into this requirement, it appears to me that, as LORD KEITH observed in *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (1), many charitable organisations holding investments would be cut out of the benefit of the section. In my view, it is really quite plain, when one considers the

(1) 121 J.P. 567; [1957] 3 All E.R. 199; [1957] 2 Q.B. 573; *affd.* H.L., post, [1958] 2 All E.R. 601.

trust deed under which the ratepayers were constituted and when one considers the history of their trust, that the ratepayers are not in any ordinary sense of that expression an organisation established for profit or an organisation conducted for profit. The trust was established for the amelioration of the condition of the poorer classes of the working population of London, and so forth by, inter alia, the provision of improved dwellings. These were the objects of the trust. It was at no time the object or the purpose of the trust to make profits, and I venture to think that the founder would have been much, and justifiably, surprised if, after he had executed this document, he had been told that this trust was a trust established for profit. I think that it is an abuse of language so to describe it. The objects, as I have said, are those enumerated in sub-cl. (A) of cl. 1, and cl. 1 (B) indicates the method which the founder recommends of carrying out the objects. It is perfectly true that in conducting their affairs on the lines indicated in para. (B) of cl. 1 the trustees did make a profit in the sense that they charged rents which, though moderate, were at such rates as to show some surplus over the outgoings incurred in respect of the various properties. It does not follow that the trust was established for the purpose of making or realising this surplus or, one may say, these profits; it was established for the purpose of ameliorating the condition of the poorer classes by, inter alia, the provision of improved dwellings. Lettings were adjusted so as to show a surplus with the sole object of supporting and furthering these charitable purposes. Not a penny of the so-called profits could ever find its way into the hands of anybody as a profit to which he was beneficially entitled. The only persons who could benefit by this surplus were the objects of the charity.

In the circumstances of this case I agree with the learned recorder that if it is shown that the ratepayers' organisation was not established for profit (i.e., for the purpose of profit) the question whether it is conducted for profit does not arise, by which I take him to mean that there can be no ground for holding that it is conducted for the purpose of profit. The point is not one which is capable of great elaboration, and all that I can add is that when one considers the whole matter it is reasonably plain that, according to all ordinary notions, the ratepayers were not established for profit or conducted for profit. They were a charitable organisation which carried out its charitable purposes in part by means of the surpluses which they could derive from the letting at moderate rents of accommodation to people of limited means. Such were the purposes of the organisation, and it does not appear to me that any question of profit enters into their case at all if one construes the language of s. 8 (1) in the way in which I have endeavoured to construe it.

There is one point on the construction of para. (a) of s. 8 (1) to which I should advert, and it is this. The sub-section says:

> "any hereditament occupied [and so on] which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

That language, it is said, suggests that the legislature had in contemplation the possibility that an object which could qualify as charitable might be established or conducted for profit within the meaning of the earlier words of the section. That argument at first sight is not without force, but in my view the language "not established or conducted for profit" is capable of being explained by the circumstance that it refers to an enumeration of particular objects, not all of which are charitable or wholly charitable. It is an enumeration which includes what one might describe as charities and near charities, and it might have been

thought necessary ex abundanti cautela to apply this qualification to the entire range without discrimination between the different objects stated. As I have said, the matter does not admit of any great elaboration. Giving it the best consideration that I can, and with all respect to the views of the members of the Divisional Court, from whom I differ with diffidence, I am of opinion that this appeal should be allowed.

SELLERS, L.J.: For the greater part of the argument I was inclined to resist the persuasive submissions of Mr. Pennycuick (counsel for the ratepayers) and to think that the decision of the Divisional Court was right. One of the difficulties which I felt about accepting the argument on behalf of the ratepayers is the matter to which my Lord has just referred, the effect of it on the words in s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, " not established or conducted for profit ". It seemed to me that the argument would go a long way to make those words unnecessary and of no effect. My Lord has indicated a manner in which they might be accepted. I still feel doubt whether there is any satisfactory way of explaining them. If you have an organisation whose main objects are charitable, it is a little difficult to see, on the argument which has been advanced, that it could be at the same time established or conducted for profit. Both requirements have to be present, that the organisation is not established or conducted for profit and that its main objects are charitable, in order to come within the section.

On the whole I have come to the conclusion that one should approach the matter in this way. The Divisional Court had before them the decision of this court in *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (1), and, in particular, the passage in the judgment delivered by PARKER, L.J., relating to this matter, which my Lord has read more fully. The material passage is:

> " The organisation accordingly does earn profits from which the members benefit, but that as it seems to us is a very different thing from being established or conducted for profit. In our judgment the earning of profits is purely incidental, and it cannot be said that the organisation is established or conducted for profit."

In the House of Lords I do not understand that that view was enlarged. It was accepted. The reasoning in support of it was developed in the speech of LORD DENNING, on which great reliance has been placed before this court, and, in particular, on the passage where he says:

> " Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects. So here, it seems to me, that, if the making of profit is not one of the main objects of an organisation, but is only a subsidiary object—that is to say, if it is only a means whereby its main objects can be furthered or achieved—then it is not established or conducted for profit . . ."

The recorder finds in the Case Stated:

> " Profit, while contemplated by the said deed, was entirely incidental to the objects of the trust."

(1) 121 J.P. 567; [1957] 3 All E.R. 199; [1957] 2 Q.B. 573; *affd.* H.L., post, [1958] 2 All E.R. 601.

I have come to the conclusion, on the grounds which my Lord has advanced more fully, that that is the right view to take and that it concludes this case. I have come to it with some hesitation and after considerable persuasion but I agree that this appeal should be allowed.

PEARCE, L.J.: I agree with the reasons which have been given by JENKINS, L.J. The making of profit by the ratepayers, the trust, was part of the machinery by which it achieved charitable purposes. The making of that profit, which could never be distributed, was not the object or purpose of the trust. It was the means for the expansion of the sphere of the charity; it was not an end in itself. Though deliberate, it was incidental and subsidiary to the purpose of the trust. In my opinion the trust was not established or conducted for profit, and the appeal should be allowed.

Appeal allowed.

Solicitors: *Travers Smith, Braithwaite & Co.: Town Clerk*, West Ham.

H.S.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND ASHWORTH, JJ.)

February 6, 1959

DIRECTOR OF PUBLIC PROSECUTIONS *v.* ROFFEY

Aerial Traffic—Flying aircraft within 1,000 yards of "assembly" in open air—H-bomb protest march—Air "close-up" for televising marchers—Air Navigation Order, 1954 (S.I. 1954, No. 829), art. 47, sch. II, r. 15 (1) (d), as amended by the Air Navigation (Fourth Amendment) Order, 1956.

Rule 15 (1) (d) of sch. II to the Air Navigation Order, 1954, as amended, prohibits the flying of an aircraft within 1,000 yards of an assembly in the open air of more than 1,000 persons assembled for the purpose of witnessing or participating in an organised event.

An "assembly" within the meaning of the article means merely a gathering of persons whether stationary or in motion, and may be constituted by a procession.

CASE STATED by Reading justices.

An information was preferred at Reading Magistrates' Court by the appellant, the Director of Public Prosecutions, charging the respondent, Frederick William Roffey, pilot of a Rapide aircraft, with flying an aircraft within 1,000 yards of "an assembly" in the open air of more than 1,000 persons assembled for the purpose of witnessing or participating in an organised event, contrary to art. 47 of the Air Navigation Order, 1954. According to the facts found, the respondent flew within 1,000 yards of the H-bomb protest march on the main Reading-Aldermaston road on Apr. 7, 1958, to enable a television cameraman to take photographs. The magistrates were of opinion that the marchers were a procession only and that the contention that they constituted an "assembly" within the meaning of the order was incorrect in law. They, accordingly, dismissed the information and the appellant appealed.

Rodger Winn for the appellant.

The respondent did not appear.

LORD PARKER, C.J.: This is an appeal by way of Case stated by magistrates of the petty sessional division of Reading before whom the respondent was charged with an offence contrary to art. 47 of the Air Navigation Order, 1954, in that he flew an aircraft within one thousand yards of an assembly in the open air of more than one thousand persons assembled for the purpose of witnessing or participating in an organised event. The regulations in question were made under s. 8 of the Civil Aviation Act, 1949, and by reg. 47 it is provided:

> " Every person and every aircraft shall comply with such of the Rules of the Air and Air Traffic Control laid down in sch. II to this Order as may be applicable to that person or aircraft in the circumstances of the case."

By Rule 15 (1) (d) of sch. II, as amended by the Air Navigation (Fourth Amendment) Order, 1956, it is provided:

> "An aircraft shall not fly over, or within 1,000 yards of, any assembly in the open air of more than 1,000 persons assembled for the purpose of witnessing or participating in any organised event."

The magistrates found that on Apr. 7, 1958, at about 11 a.m. on the main road between Reading and Aldermaston on and near the railway bridge at Burghfield more than 1,000 persons were present and participating in an organised event, namely, a protest march against the manufacture of the hydrogen bomb. They also found that the respondent

> " being then in command of a Rapide aircraft, flew it within 1,000 yards of the said persons at a height of 500 feet or rather less, to enable a television photographer, who was his passenger, to photograph them."

Notwithstanding that, they dismissed the information, stating:

> " We were of the opinion that the said persons were a procession only, and that the contention [of the respondent] was correct in law, and, therefore, decided to dismiss the said summons."

The contention was that the persons referred to did not constitute an assembly. It seems to me, however, to be perfectly clear that there can be an assembly whether it is stationary or in motion. Bearing in mind the mischief aimed at by this regulation, it seems to me that " assembly " is to be construed as merely a gathering of persons, and it matters not whether they have gathered and are, for instance, in their city or town at a football stadium or whether they are gathered together on the road for the purposes of demonstration—whether they are stationary or moving on the road. In my judgment, an offence was clearly made out in this case and the case should be remitted to the magistrates with a direction to convict.

DONOVAN, J.: I agree. These Orders are framed with a view to public safety and to avoid disasters which could conceivably be great, and while, therefore, they are to be fairly construed, they are not to be approached with a view to putting the narrowest possible construction on them. It is not without significance that the offender does not now even attempt to justify the magistrates' decision. These regulations were broken, not by mistake or inadvertence, but for commercial ends. While the question of penalty is one entirely for the magistrates, I hope they will not think that this offence was trivial.

ASHWORTH, J.: I agree.

Appeal allowed.

Solicitor: *Director of Public Prosecutions.*

T.R.F.B.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., DONOVAN AND HINCHCLIFFE, JJ.)

February 16, 1959

R. *v.* WEST

Criminal Law—Sentence—Postponement—Opportunity to prisoner to fulfil promise to make restitution.

It is wrong to postpone sentence in order to give a prisoner an opportunity of fulfilling a promise to make restitution.

APPEAL against sentence.

In April, 1958, the appellant pleaded Guilty at Newcastle-under-Lyme Quarter Sessions to forgery, uttering a forged document, and fraudulent conversion. The recorder, on being informed that the appellant would be prepared to make restitution at the rate of £3 per week, said: "You are at present in a reasonably good job, and I think it is a very great pity you are not in a position today to make some offer of restitution, but you are not. I shall postpone sentence for six months, because the suggestion is that you can pay up to £3 a week, and it is accepted that the total sum involved is something just under £60. I cannot order you to repay, but I will postpone sentence if you are willing to promise me to come up for judgment in six months." The appellant stated that he was willing, and sentence was postponed for six months. When the appellant appeared for sentence in October, 1958, he had not made any repayment. The recorder then passed a sentence of three years' corrective training.

No counsel appeared.

LORD PARKER, C.J.: The course adopted by the recorder is just what this court has said ought not to be done. If a prisoner is thought fit to be put on probation, let him be put on probation. If it is not a matter of probation, let him be sentenced there and then, but it is highly objectionable to propose sentence and at the same time to turn the court into a money-collecting agency. The appellant never did pay anything and when he was finally brought up he was sentenced to three years' corrective training. This court feels that not only was the original method of dealing with the case quite wrong, but also that this is not a case for corrective training and that they should substitute a sentence of eighteen months' imprisonment, which will date from April 18, 1958.

Sentence reduced.

T.R.F.B.

COURT OF APPEAL

(LORD EVERSHED, M.R., ORMEROD, L.J., AND LLOYD-JACOB, J.)

February 23, 24, 1959

DE JEAN AND ANOTHER *v.* FLETCHER

Rent Control—Furnished house—Excess rent—Right to recover—Rent of previous tenancy fixed and registered—Subsequent letting at rent exceeding registered rent—Furnished Houses (Rent Control) Act, 1946 (9 *and* 10 *Geo.* 6, *c.* 34), *s.* 4 (1) (*a*), (2).

Premises consisting of two furnished rooms were let by the landlord to a tenant at £2 per week. On the application of the tenant the rent tribunal fixed the rent at £1 per week, which rent was entered in the register kept by the local authority. In July, 1956, the landlord let the premises to another tenant at a rent of £3 per week. The entry in the register remained unchanged, and the present tenant claimed the return of the over-payment of rent of £2 per week.

HELD: once a rent had been entered in the register for any premises, that was, unless it were changed, the rent payable, and any excess of the registered rent was recoverable by any subsequent tenant.

APPEAL by the defendant, Arthur William Fletcher, from that part of a judgment of His Honour JUDGE DAYNES, Q.C., at West London County Court, whereby he held that the plaintiffs were entitled to recover from the defendant £192 as rent received by the defendant in excess of the registered rent for furnished premises consisting of two rooms on the top floor of No. 31, Ashchurch Grove, Shepherds Bush, with the right to share the use of a bathroom.

The same furnished premises had been previously let by the defendant to other tenants, Mr. and Mrs. Gatens, at a rent of £2 a week. In 1955, on an application by the Gatens under the Furnished Houses (Rent Control) Act, 1946, the Fulham and Hammersmith Rent Tribunal reduced the rent from £2 to £1 a week, under s. 2 (2) of the Act, for the duration of the Act, and that rent was entered on the local authority's register of rents, pursuant to s. 3 (2), and was still on the register. On July 7, 1956, after the Gatens had left, the defendant let the same furnished premises to the plaintiffs, Alphonso De Jean and his wife Margarette De Jean, at a rent of £3 a week. Before the plaintiffs took possession, the defendant, at the plaintiffs' request or, at any rate, for their convenience, spent about £20 in redecorating the rooms and about £50 in improving the furnishings. The plaintiffs, on their part, agreed to pay the £3 a week, and they paid this rent until May 17, 1958. They then refused to make any further payment. On May 30, 1958, the defendant served on the plaintiffs notice to quit expiring on June 28, 1958. The plaintiffs then brought this action.

In the action, the plaintiffs claimed the sum of £192 as rent which they had overpaid, and they also claimed damages against the defendant for trespass on their premises before the expiry of the notice to quit. The defendant, on his part, alleged assault by the male plaintiff. The learned judge found the issues of assault and trespass proved, and awarded £15 damages to the plaintiffs in respect of the trespass and £10 damages to the defendant in respect of the assault, and he gave judgment for the plaintiffs on their claim for the repayment of the excess rent.

The defendant in person.

Elson Rees for the plaintiffs.

LORD EVERSHED, M.R.: This is an appeal, on one important and not altogether easy point, from a judgment of His Honour JUDGE DAYNES, sitting as deputy judge in the West London County Court. The learned judge felt impelled on this point to decide against Mr. Fletcher, the defendant in the action, contrary to his own inclination, because (as he thought) certain authorities compelled him to do so.

[HIS LORDSHIP stated the facts, and continued:] Speaking without knowledge of anything that went on between the two parties, one's sympathies are with the defendant. The plaintiffs made this bargain, they paid the rent and had the advantage of living on the premises; and suddenly to be told that one has to pay back nearly £200 would come as a nasty shock to anybody. As against that, however, it can be said with force that the defendant was a party to the determination by the tribunal and knew, or should have known, that the rent fixed by the tribunal was registered under the Furnished Houses (Rent Control) Act, 1946; he cannot, according to the principles of our law, claim to be ignorant of the legal provisions which bind him, and he took the risk of charging a rent which was three hundred per cent. more than that which was on the register. The question is: Did the determination of the tribunal, on the application made by the Gatens, and the subsequent registration of its result operate to make the rent which could lawfully be charged for these premises limited to £1 a week unless and until, on further application, it was altered? I shall refer in a moment to the necessary provisions of the Act of 1946, but I would like to say one thing by way of caveat. In the course of listening to the careful and fair presentation of the matter by counsel for the plaintiffs, we have had some discussion on what might be comprehended by the word "premises" which occurs in certain of the relevant sub-sections. To take a simple example—if the subject-matter of the letting is a furnished house, are the premises, for the purposes of the Act of 1946, the same if the house itself is the subject of a later letting, even though there may be some, and even substantial, alterations within it, or even additions to it? Or again—to what extent are the "premises", within the meaning of the Act, liable to be affected by substantial changes in the internal equipment, including furniture? I do not propose to embark on any questions of that kind, since, for the purposes of this case, it can, I think, be taken that the subject-matter of the letting to the plaintiffs was the same, for all relevant purposes, as the subject-matter of the letting to the Gatens. Money had been spent on redecoration and improving the furniture, but it must, I think, be taken, on the facts before us, that the premises were the same in the two cases.

I now turn to the Act itself. Section 2, in sub-s. (1) and sub-s. (2), appears to be dealing, and dealing only, with a particular contract of letting. Section 2 (1) reads:

> "Where a contract has . . . been entered into whereby one person (hereinafter referred to as the 'lessor') grants to another person (hereinafter referred to as the 'lessee') the right to occupy as a residence a house or part of a house situated in [a relevant district] in consideration of a rent which includes payment for the use of furniture . . . it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district . . ."

Then there follow certain provisions which are of an administrative nature. Section 2 (2) reads:

> "Where any contract . . . is referred to a tribunal, then . . . the tribunal shall consider it and, after making . . . inquiry . . . shall approve the rent

payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable, or may . . . dismiss the reference, and shall notify the parties and the local authority of their decision in each case."

So far, it cannot be in doubt that what these two sub-sections are doing is to say that either party to a contract of letting of a furnished house, or the local authority, may apply to the relevant tribunal, which may vary the contract in the way indicated. Then comes s. 2 (3), and it will be seen at once that there is a change of emphasis, to put it no higher, as the sub-section reads:

" Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for reconsideration of the rent so entered on the ground of change of circumstances . . ."

I need not, I think, read any more of s. 2. The reference to the register which is forecast in s. 2 (3) is explained in s. 3, which provides, in sub-s. (1), that the local authority is to " prepare and keep up to date a register for the purposes of this Act " and that the register is to be open for inspection. Then s. 3 (2) reads:

" The register shall be so prepared and kept up to date as to contain, with regard to any contract under which a rent is payable that has been approved, reduced or increased under the last foregoing section . . . entries of . . . (b) a specification of the premises to which the contract relates; and (c) the rent as approved, reduced or increased by the tribunal, and, in a case in which the approval, reduction or increase is limited to rent payable in respect of a particular period, a specification of that period."

To my mind s. 3 creates difficulties. In the first place, as will be appreciated from my reading of sub-s. (2), it seems to go back in emphasis to the contract. Particularly does that appear from para. (b), which says that the entry is to be the " specification of the premises to which the contract relates ". Then under para. (c)—and a point of difficulty arises here, as I think—" the rent as approved . . . ." is to be entered, and there is a distinction made where the reduction (and so on) " is limited to rent payable in respect of a particular period . . ." It may be argued: Does that mean a particular period being something less than the contractual period; or is it a particular period without limitation?—as the words say, any period short of (or, of course, not greater than) the duration in operation of the Act itself.

For the moment I pass over these difficulties to go to s. 4 which undoubtedly, in point of emphasis, swings back, and swings back somewhat heavily, in the direction forecast in s. 2 (3). Section 4 (1) reads:

" Where the rent payable for any premises is entered in the register . . . it shall not be lawful to require or receive—(a) on account of rent for those premises in respect of any period subsequent to the date of such entry, (or, in a case in which a particular period is specified, in respect of that period) payment of any sum in excess of the rent so entered . . ."

Then (and I refer to this because I think that it is helpful), as the Act originally ran there was a para. (b) which contained a provision dealing with the grant of a new tenancy and prohibiting the demand of a premium in addition to the rent. Section 4 (2), as amended by the Landlord and Tenant (Rent Control) Act, 1949, s. 12 (4), reads:

" Where any payment has been made or received in contravention of the foregoing sub-section, the amount thereof shall be recoverable by the person by whom it was made."

The only other sections to which I propose to allude are s. 8 and s. 9. Section 8 empowers the Minister to make regulations, and the certificate which is before us, stating what was the effect of the registration in this case, was issued in pursuance of those regulations—the Furnished Houses (Rent Control) Regulations, 1946. Section 9 (1) makes it an offence to require payment in contravention of s. 4, and the offender is liable on summary conviction to a fine not exceeding £100—and he may also be ordered, be it observed, to repay any excess payment which he may have received.

The fact that disregard of the requirements of the Act involves penal consequences is beyond doubt a strong ground for saying that one has to construe it fairly strictly; and I proceed so to do. Ultimately, however, the question turns on the true effect of s. 4 as applied to this case; for, putting it in the form of a question—did the plaintiffs prove that, " the rent payable for [these] premises " having been entered in the register, there had been a " requirement " or a " receiving " by the defendant of a payment in excess of the recoverable rent?

There is no doubt that " the rent payable for [the] premises ", on the face of it, was entered in the register; and it seems to me that the plaintiffs must be entitled to succeed unless it could be said that the effect of any registration was limited to the duration of the particular contract which was the subject of the tribunal's determination. If sub-s. (2) and sub-s. (3) of s. 2 stood alone, there would be no doubt, I think, that the determination would be limited to the contract which was presented to the tribunal. I have, however, come to a clear conclusion that, when one looks at sub-s. (3) of s. 2, which speaks of a rent payable for the premises being entered on the register, and, in particular, at s. 4, to which I have already referred, one cannot avoid the conclusion that the effect of the Act is that once, quoad any premises, a rent has been entered on the register, then that is the rent for those premises until it is changed by some subsequent determination or until the period for which the entry has been made expires; and I cannot think that it would be justifiable to read words in—particularly into s. 4—so as to limit the " rent payable " to the rent payable during the currency of the particular contract. The Act does not say so; and, indeed, when one considers the obvious scope and purpose of the Act, it would make all this business of registration rather nonsensical if the registration ceased to have any effect whenever a contract ended. We all know that these contracts may be of quite short duration, and the requirements of registration, the notification of the local authority, and the register being open to the public seem to me to lose nearly all their force if the registration is to have such a very ephemeral effect.

That view is, I think, clearly borne out in the decisions of the courts in which the question has been involved. It is true that there is no decision of this court which governs us, or covers this point. The only decision of this court which was referred to here and below was *Lazarus-Barlow* v. *Regent Estates Co., Ltd.* (1). That was a case which arose under the Rent Restrictions Acts, and the only relevant point in it was that, in the course of reading the judgment of SOMERVELL, L.J., and myself, I observed that there were some dangers in using the phrase " in rem " when one spoke of determinations under the Rent Acts. That obviously does not help very much in this case, although it has been referred to as perhaps having an analogy in cases under the Furnished Houses (Rent Control) Act, 1946. There has, however, been a number of cases before the courts, and, though in some the point at issue was different, the assumption clearly was that the registration continued to operate in the way which I have stated and was not limited to the duration of the particular contract. I give

(1) [1949] 2 All E.R. 118; [1949] 2 K.B. 465.

one example of that—*Gluchowska* v. *Tottenham Borough Council* (1). In that case, there had been registration in respect of particular premises—that is, a set of rooms—and at a later stage the landlord had let, not all those rooms, but some of them, herself occupying the others. The question which was debated in the court was whether the premises were the same in the second letting. By a majority, the Divisional Court came to the conclusion that they were not, and that, therefore, the provisions of s. 4 did not apply. There would have been nothing in the case if the right answer had been that the registration lasted only for the original contract, as that contract had come to an end some time before.

The point was directly considered, and, indeed, determined, in *R.* v. *Fulham, Hammersmith & Kensington Rent Tribunal, Ex p. Gormly* (2). That was a case of the following kind. In 1949, on the application of the landlord, a rent tribunal fixed the rent of a furnished house at £4 a week, which rent was registered under s. 3 (2) of the Furnished Houses (Rent Control) Act, 1946. Two years later, on the reference of a new tenant, the tribunal ordered a further reduction, no change of circumstances being alleged. As the learned judge in the court below pointed out, that case might have been sufficiently decided on the short point that, since there was no change of circumstances, no question of altering the rent downwards could arise; but beyond doubt the court (consisting of LORD GODDARD, C.J., SLADE and DEVLIN, JJ.) expressed their views on this question of the duration of a registration. The conclusion is sufficiently stated in the headnote as follows:

> "... the rent fixed by a rent tribunal under s. 2 (2) of the Act and registered under s. 3 (2), was the rent payable in respect of the premises and not merely the rent payable as between the particular parties who took the case to the tribunal; that rent remained until, if it were fixed for a period, the expiration of that period, or until it was altered by the tribunal on an application made under s. 2 (3) of the Act on consideration of changed circumstances ..."

LORD GODDARD, C.J. (with whom DEVLIN, J., agreed), after stating that a register had to be kept, said:

> "This seems to me to point strongly to the intention that decisions of tribunals should be registered for the information of the public, that the rent so registered should be the rent payable in respect of the premises and not merely the rent payable between two particular parties who first took the case to the tribunal ..."

—a passage reflected in the headnote, but also indicating a point which I have earlier made, namely, the sense and purpose of the legislation which seems clearly to emerge.

The last case that I propose to mention is *R.* v. *Adamson* (3), which came before the Court of Criminal Appeal. There the circumstances were closely similar to those which we have here. A rent tribunal had ordered a reduction in the rent of furnished premises. By a later contract with a new tenant, the landlord had charged a rent in excess of the registered rent. She was charged with an offence under s. 9 of the Act of 1946 and convicted. According to the short note of the judgment, LORD GODDARD, C.J., said:

> "... this was a case in which a landlord whose power to charge rent was controlled by the Furnished Houses (Rent Control) Act, 1946, had

(1) 118 J.P. 175; [1954] 1 All E.R. 408; [1954] 1 Q.B. 438.
(2) 116 J.P. 22; [1951] 2 All E.R. 1030; [1952] 1 K.B. 179.
(3) (1957), "The Times", July 16.

re-furnished the rooms which she intended to let and thought that she was thereby entitled to increase her rent. It had been argued on behalf of the [landlord] that the expression 'premises', referred to in s. 4 of the Act of 1946, meant not merely the bare shell . . ."

I need not pursue that aspect of it, because, as I have earlier said, I am expressing no view on that kind of point. The report ends:

"His Lordship said that, although the conviction was right and must stand, the case was a proper one for the grant of an absolute discharge, on the condition that [the landlord] repaid the excess rent which she had charged."

That case, on its facts, is obviously closely similar to this; and the sum of the matter seems to be that all these cases have for an appreciable period of time—the Act has now been in operation for twelve years—uniformly followed the view which the learned judge adopted in the present case, although he indicated that his own view, unaided by authority, would be the other way. With all respect to him, my own view, unaided, is in line with the authorities. I venture a criticism of the learned judge with diffidence; but he concentrated somewhat on sub-s. (1) and sub-s. (2) of s. 2 of the Act and did not (as I think) give sufficient weight to sub-s. (3) of s. 2 and, in particular, to s. 4. However, that is by the way. I have given my reasons for thinking that the conclusion reached by the judge was the right one.

As the case is somewhat important, I have dealt with it at some length. The defendant, as he frankly conceded, did not feel that he was altogether well qualified to debate in this court a problem which is a pure problem of construction of an Act of Parliament, and I feel some sympathy with him. He has, however, come to this court. He may perhaps have been encouraged by the learned judge's expression of what his own view was. Although we have not had the advantage of argument on this matter of law from the defendant, counsel for the plaintiffs has drawn our attention scrupulously to all the cases on the points, and, having considered them to the best of my ability, I reach the conclusion that this appeal must fail and, therefore, should be dismissed.

ORMEROD, L.J.: I am of the same opinion, and there is very little that I wish to add. The learned county court judge expressed the view that, had he not been bound by authority, he would have come to a different conclusion from the one to which in fact he did come, but that he was bound by the decisions in the Divisional Court to which LORD EVERSHED, M.R., has referred.

The view which the learned county court judge would have liked to take is expressed in his judgment when he says that, on consideration of s. 2 (1) and (2), the key word is "contract", and that he would regard that as the key word which should dominate the whole of the interpretation of the statute. As LORD EVERSHED, M.R., pointed out—and I agree with the view which he has expressed—if it were not for s. 2 (3) and s. 4, there might be something in the view expressed by the learned county court judge. It appears to me, however, that the change of wording which takes place in s. 2 (3) and s. 4 puts beyond doubt that the view expressed by the Divisional Court in the various cases to which we have been referred is the proper one. The opening words of s. 2 (3) are, "Where the rent payable for any premises has been entered in the register . . ." Had the proper construction of the Act been that it would relate only to entries in the register is respect of an existing tenancy, the simple way to have done it would have been to say "Where the rent payable under any contract of tenancy" (or words to that effect) "has been entered in the register . . ."

Those words have not been used, and the change appears to be a deliberate one. I can only come to the conclusion that it has been made so that, once the rent has been determined, that rent should remain, irrespective of the duration of the tenancy, for so long as was provided by the order, or, alternatively, for the duration of the Act. Again, in s. 4 (1) the wording is:

> " Where the rent payable for any premises is entered in the register under the provisions of this Act . . ."

—and not, " Where the rent payable under any contract of tenancy is entered in the register under the provisions of this Act . . ." That again, I think, confirms the view that the proper interpretation is that the rent fixed by the tribunal should continue until it is altered by the tribunal or until the period for which the order has been made has expired.

It may be unfortunate in this case that the defendant has to repay money which he has overcharged in respect of this tenancy. It may be—I am expressing no opinion on it—that, had he gone back to the tribunal, having regard to the improvements that he had made to the premises, there might have been some increase in the rent which the tribunal had determined. But that was not done, and there is no answer to the claim for the repayment of the money which the defendant has overcharged the plaintiffs. I agree that the appeal must be dismissed.

LLOYD-JACOB, J.: I also agree.

Appeal dismissed.

Solicitors: *D. J. A. Griffiths.*

F.G.

COURT OF APPEAL

(MORRIS AND SELLERS, L.JJ., AND WYNN-PARRY, J.)

January 13, 14, March 2, 1959

LONDON COUNTY COUNCIL *v.* TOBIN

Compulsory Purchase—Compensation—Costs incurred in formulating claim—Legal and accountancy fees—Lands Tribunal Act, 1947 (12 *and* 13 *Geo.* 6 *c.* 42), *s.* 3 (5), *sched.* 1, *Part* 2, *para.* 5*—Loss of goodwill—Business more profitable in new premises than in old—Extra capital spent on new premises—Increase of staff—Some goodwill lost by move—Valuation of loss.*

The claimant had carried on business as an optician at freehold premises in Mile End Road, London, since 1912. The premises became subject to compulsory purchase, and notice to treat was served on Jan. 14, 1952. On June 6, 1955, the claimant vacated the Mile End Road premises and moved his business to premises just over a mile away, of which he bought an eighteen years' lease. The claimant, who had failed to find any nearer or more suitable premises, had to spend £3,000 on acquiring, repairing, fitting out and equipping these new premises, at which he had slightly more accommodation for his business, and at which he employed a fully qualified assistant instead of an apprentice. Notice of reference of the claim for compensation to the Lands Tribunal was given on Dec. 30, 1955, but the hearing before the tribunal did not take place until February, 1957, by which time the business had been established in the new premises for eighteen months, was increasing, and was substantially more profitable than it had been at the old premises. The

Lands Tribunal found that on the move the claimant had retained a considerable part, but not all, of his goodwill; that the goodwill of a business, which is an asset which can be realised at any time, increases in value the longer the business is carried on at the same premises or near thereto; but that the business carried on at the new business differed from that formerly carried on by the claimant in regard not only to the premises and their situation, but also in the employment of a fully qualified assistant, which was necessary to enable the increased business to be carried on. Taking all these factors into consideration, the tribunal assessed compensation for loss of goodwill by calculating the capital value of the goodwill at the old premises by multiplying the average annual profit during the claimant's last three years by three, calculating the capital value of the retained goodwill by multiplying the average annual profit during the eighteen months the claimant had been at the new premises by one and a half, and subtracting the latter from the former. On appeal by the acquiring authority against this award,

HELD: (i) legal and accountancy fees necessarily and properly incurred by a claimant for compensation for the compulsory acquisition of his land should be included in the compensation awarded.

Skinners & Company v. *Knight*, [1891] 2 Q.B. 542, distinguished.

(ii) method of assessment of compensation by comparison of capital values was not wrong in principle; the question as to the multiplier to be taken, i.e., the number of years' purchase, was essentially a question of fact and a matter of judgment for the tribunal having regard to the facts, figures and features of the case, and it had not been shown that there was error of law in the tribunal's method of approach to this question; and, therefore, the appeal must be dismissed.

CASE STATED by the Lands Tribunal for the decision of the Court of Appeal pursuant to s. 3 (4) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58A, on a claim for compensation by Bertram Tobin in respect of the compulsory acquisition of the freehold premises owned and occupied by him for the purposes of his business as an optician at 382, Mile End Road, London.

The claimant, who had been born on the premises in 1890, had carried on business there as an optician since 1912, and at all material times had no intention of selling his business. The notice to treat was dated Jan. 14, 1952, and was served on the claimant, but he did not vacate the premises until June 6, 1955, when he moved his business to new premises at 129, Whitechapel Road. Between these dates the claimant, with the assistance of the acquiring authority, had vainly attempted to obtain an alternative site near 382, Mile End Road. Eventually, he took an eighteen-year lease of 129, Whitechapel Road, which is just over a mile away, at a rent of £400 p.a., but he had to spend £3,000, comprising a premium of £600 for the lease and a sum of £500 on necessary repairs and the remainder on fitting out and equipping the new premises, which had up till then been a warehouse. The new premises provided slightly more accommodation and at them, the claimant, who had been advised by his doctor to take care and go easily after an illness in 1951, employed a better paid qualified assistant instead of an apprentice. Notice of reference to the Lands Tribunal was given on Dec. 30, 1955, but the hearing before the tribunal did not take place until February, 1957, and the tribunal's decision was dated June 14, 1957. By the time when the tribunal heard the reference, the claimant had been in his new premises for eighteen months. The tribunal found that the claimant was doing more business in his new premises than he had in the old, that his business was increasing and was substantially more profitable; that the claimant had retained a considerable part, but not all, of his goodwill; that the goodwill of a business increases its value the longer the business is carried on at the same premises or near thereto; and that the business carried on at the new premises differed from that formerly carried on by the claimant in regard not only to the premises and their situation but also in that the claimant employed at the new premises a fully qualified assistant, which, although it enabled the claimant to act on his doctor's advice, was necessary if the increased business was to be done. In assessing compensation for loss

of goodwill the tribunal compared the capital value of the old business in the premises compulsorily acquired with the capital value of the new business in the new premises, ascertaining the loss of goodwill by deducting the latter from the former. Taking all the foregoing factors into consideration the tribunal ascertained the capital value of the goodwill of the old business by multiplying by three the average annual net profit for the last three years (viz. 1952/53, 1953/54 and 1954/55), and ascertained the capital value of the goodwill of the new business by multiplying by one and a half the average annual net profit for the two years 1955/56 and 1956/57, that for the latter year being an estimated profit. The difference ascertained by deducting the latter value from the former was £750, which the tribunal awarded to the claimant as compensation for loss of goodwill.

The claimant had incurred expenses of twenty guineas for legal advice and five guineas accountancy fees in connexion with the preparation of his claim for compensation after receipt of the notice to treat. It was agreed between the parties, and the Lands Tribunal found, that these expenses were a reasonable expenditure and reasonably incurred. The tribunal held that the costs incurred by a claimant in formulating his claim are proper subjects of compensation, and, accordingly, awarded the claimant twenty-five guineas compensation in respect of these items.

The acquiring authority now appealed by way of Case Stated from these decisions of the tribunal as to compensation for loss of goodwill and as to legal and accountancy fees. The questions for the Court of Appeal were whether on its findings of fact the tribunal came to a correct decision in law in determining (i) that the legal expenses and accountants' fees incurred by the claimant in preparing a claim in response to the notice to treat formed a proper subject of compensation and were correctly included in the tribunal's award; (ii) that the claimant was entitled to the sum of £750 in respect of his claim for damage to the goodwill of his business consequent on the compulsory acquisition of his business premises.

Stewart-Brown, Q.C., and *Goodfellow* for the acquiring authority.
Scrivens for the claimant.

Cur. adv. vult.

Mar. 2. The following judgments were read.

MORRIS, L.J.: The facts which gave rise to the claim of Mr. Tobin are clearly recorded in the decision of the Lands Tribunal and in the Case Stated, and I do not propose to recount them at length. The claimant's premises at 382, Mile End Road, which he owned and which he occupied for the purposes of his business as an optician, became subject to a compulsory acquisition order. A notice to treat was served on him on Jan. 14, 1952, but he did not vacate until June 6, 1955, when he moved his business into new premises at 129, Whitechapel Road. Notice of reference to the LANDS TRIBUNAL was given on Dec. 30, 1955. The hearing before the tribunal was in February, 1957, and the decision of the tribunal is dated June 14, 1957. The further amended particulars of claim, which were the subject of reference to the tribunal, included many items, but only two of these are now in question. There was one item under which £3,000 was claimed for " Damage of profits and goodwill ". The claim was alleged to represent the loss of goodwill consequent upon the removal to the new premises.

The Lands Tribunal dealt with the claim in their decision in the following words:

> " It was contended that an established one-man business in freehold premises would command three years purchase of the average profits, whereas a new business in leasehold premises and a business which involved the

employment of a qualified assistant would command only one year's purchase of the profits. Mr. Moore, for the purpose of his valuation, assumed that the profits before deducting rent and rates would remain constant, and that the difference in the new profits was therefore wholly attributable to the increased rent. This appears to us to be really an attempt to compensate the claimant for his increased rent which it is clear from the authorities (see per DENNING, L.J., in *Harvey* v. *Crawley Development Corporation* (1)) cannot be done. It must, we think, be assumed that the increased rent is justified by the increased business capacity of the new premises, and indeed it is clear from the evidence that the average gross takings for the two years subsequent to removal are £6,725, whilst those for the two years prior to removal are £4,472. However, the business which is being carried on at the new premises differs from that formerly carried on by the claimant in regard not only to the premises and their situation but also in the employment of a fully qualified assistant. A direct comparison is therefore impossible, and it seems to us that what we have to attempt to evaluate is the loss which the claimant has suffered in the goodwill which was attached to the business carried on by him in his premises at 382, Mile End Road. Had he been able to acquire premises in its immediate vicinity it is obvious that the loss would have been negligible, while if he had been forced to re-establish himself in an entirely different part of London, little or none of the goodwill would have followed him to his new premises. It was contended on behalf of the claimant that the correct method of assessing his loss was by comparing the capital value of the old business in the acquired premises arrived at by taking three years' purchase of the average net profits for the last two years, namely, 1953/54 and 1954/55, with the capital value of the new business in the new premises, arrived at by taking one years' purchase of the average of the net profit for 1955/56 and the estimated net profit for 1956/57. We approve this method in principle, but its application has necessitated our making a number of adjustments to the figures in the accounts in order to make a fair comparison between the net profits of the old business and those of the new one. In valuing the old business we have decided that the correct method is to multiply the average net profit by three years' purchase as contended for by the claimant, but we have adopted the average profits for three years as contended for by the acquiring authority. In valuing the new business we are unable to accept the evidence of the claimant's advisers that it was unsaleable or worth at most only one year's purchase. Having regard to our finding that a not inconsiderable part of the goodwill has remained, and to the fact that the net profits of the new business have been substantially higher than those of the old business and, according to our calculations, have been on the increase, we consider these views to be unduly pessimistic. We are also mindful of the fact that Mr. Moore, in an earlier calculation which he disregarded but which was communicated to the acquiring authority by Messrs. Silkin & Silkin in a letter of Feb. 16, 1956, valued the new business at two years' purchase of the net profit. In the light of all this evidence we have come to the conclusion that one and a half years' purchase is the appropriate multiplier, and this is the figure we have applied. In the result, we calculate the loss sustained under this head of the claim at £750."

The question of law as stated by the Lands Tribunal is whether on their findings of fact they came to a correct decision in law in determining that the

(1) (1957), 121 J.P. 166; [1957] 1 All E.R. 504; [1957] 1 Q.B. 485.

claimant was entitled to the sum of £750 in respect of his claim for damage to the goodwill of his business.

It is to be observed that the approach of the Lands Tribunal involved ascertaining the " capital value of the old business " in the premises which were acquired and comparing it with the " capital value of the new business in the new premises ". In their context the phrases " capital value " clearly refer to the value of the goodwill and only to that. It does not seem to me that this is wrong in principle. The claimant was compelled to move. He was compelled to relinquish the capital asset, i.e., the goodwill which had resulted from his having built up an established business in his own premises at 382, Mile End Road. If, because of his enforced uprooting, his new capital asset, i.e., the value of the goodwill of his business in the new premises has been diminished, then he has suffered a loss. It is said, however, that the method of approach of the Lands Tribunal is erroneous because it assumed a sale of the goodwill of the business in the new premises at or about the date of the hearing before the Lands Tribunal, and it is said that as no sale had taken place or was in prospect the award compensated the claimant for a loss which he had not suffered nor was about to suffer. The Lands Tribunal have found that the goodwill of a business, which is an asset which can be realised at any time, increases in value the longer the business is carried on at the same premises or near thereto. But the Lands Tribunal could not peer into the future and could only make a reasonable comparison between what the claimant possessed when he was forced to leave his premises and what he later possessed. He had been at the old premises for over forty years, and had had no intention of leaving them; his goodwill was valued on the basis of three years' purchase of his average net profits. The Lands Tribunal were comparing like with like when they endeavoured to assess the value of the goodwill in the new premises which again the claimant had no intention of leaving. Had the Lands Tribunal been dealing with the claim in December, 1955, at the time of the reference to them, their task would have been indeed difficult. As they were dealing with the claim in February and June, 1957, it was possible for the Lands Tribunal to have regard to the fact that the business had been continued and was continuing and to the known facts of performance and achievement at the new address; it was entirely proper for the Lands Tribunal to take these known facts into calculation: see *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Company* (1). The difficult task of the tribunal was to decide the number of years' purchase to apply in the case of the business at its new address. After all the years at the old address three years' purchase was taken. It might have been that immediately after the hearing or after the decision of the tribunal the claimant might have died. What was the appropriate number of years purchase? It seems to me that it is only accidental that at the date of the hearing the claimant had been in the new premises just over one and a half years and that the tribunal took one and a half years' purchase. It may be that the tribunal were of the opinion that there would have to be many more years of occupancy and trading activity before the goodwill could be sold on the basis of more than one and a half years' purchase. But the question as to the multiplier to be taken, i.e., the number of years purchase, was essentially a question of fact for the tribunal, and, unless they have erred in principle, then it is not for this court to say that the decision is wrong in law. It may be that a different multiplier could have been taken and that the resultant figure for loss of goodwill would have been less; but the difficult task of fixing the appropriate number of years to be taken was essentially a matter of

(1) [1903] A.C. 426.

judgment have regard to the facts, figures and features of the case. It is said that no sale had taken place at the date of the hearing and that none was in prospect. That is perfectly correct. But those facts were well known to the Lands Tribunal and must have been in their minds. In spite of the known facts as to the business, it had been argued that the goodwill was not saleable but the tribunal rejected that view.

It is further said that, though it would have been reasonable to give compensation on the basic that there was a risk that the goodwill of the business in the new premises might have to be sold before it was sufficiently long established for the value of the goodwill thereof at least to equal the value of the goodwill of the business in the old premises at the date of the notice to treat, yet the award of £750 as calculated was erroneous (a) because it took no account of the likelihood or unlikelihood of such a sale and (b) because it took no account of the fact that the claimant was receiving greater profits from the business at the new premises than he had at the old and would continue to do so until a sale took place. But it does not seem to me that the Lands Tribunal neglected to take account of any of these matters. They set out in the special case that the claimant had, at all material times, no intention of selling his business. His net profits were higher than before and were on the increase. But it might nevertheless happen that at any time after the hearing before the tribunal the business would have to be sold. It would not be reasonable for the tribunal to make speculative calculations as to the future; they had to do the best they could at the time when the matter was before them. At that time the position was, as their decision shows, that " a not inconsiderable part of the goodwill has remained ". That involved that some goodwill had not remained. A consequence would be that there might be some loss of a capital asset as a result of the enforced move. If loss were caused to the claimant he ought not to be deprived of receiving proper compensation for it on the supposition that if he survived, and if he worked diligently to make up for what he had lost, then he could at some future time eliminate it. There is, I think, force in the view that it would not be correct simply to proceed on the basis of what the goodwill would fetch if there were a forced sale at the time of the hearing before the Lands Tribunal. Some reasonable consideration would have to be given to the hope or expectation that any sale would probably be deferred. But it would not follow that the time would speedily be reached when some higher multiplier than that fixed would be appropriate; it might take some years before two years' purchase would be appropriate to compare with the calculation of three years' purchase in reference to the business in its old location. It does not seem to me to be shown that a higher multiplier than one and a half would necessarily have been taken if the Lands Tribunal had attempted to speculate as to the capital value of the goodwill on various future dates in the not too distant future. The acquiring authority gained by reason of the fact that the reference was not heard until February, 1957, by which date it was known that the business was continuing, was thriving, and was on the upgrade. But it might have proved unfair to the claimant if the Lands Tribunal had only proceeded on the assumptions that (i) the claimant would go on living for some time, (ii) the claimant would go on building up his business, and (iii) the business would become progressively remunerative. If all these things do happen, it may still take some time before the goodwill of the new business becomes equal in value with the goodwill of the old. The tribunal used the knowledge derived from ascertained experience, but they had to do their best without basing themselves on every conceivable assumption which, if not falsified by later events, might tend to diminish the measure of the claimant's loss. It is true that he was

making larger net profits than before. But to some extent that was a result of the fact that he had invested new capital in the business after its move to new premises and to the fact that the business carried on at the new premises differed from that carried on at the old.

A point was taken that the Lands Tribunal should not have referred to the claimant's business at 129, Whitechapel Road as a "new business". But the result has in no way depended upon any particular description or phrase but upon the facts themselves as set out in the decision and the special case. The claimant has continued his business, but as a result of the enforced move his business has certain changed features. Before, it was an established business in freehold premises. After the move the business was in leasehold premises. "A not inconsiderable part of the goodwill" remained; some was lost. But when the change took place some capital was expended in fitting out and equipping the new premises. Furthermore, a qualified assistant was employed. This circumstance did, however, bring the claimant a measure of relief which, for health reasons, was welcome to him. He was, however, fortunate in that in the new premises his net profits were substantially higher than they had been before he moved and in that they showed a progressive increase. It seems to me, however, that the increased profits must to some extent have resulted from his investment of capital. All these and other circumstances were weighed by the Lands Tribunal. There were features of the situation which were rather special; some of these tended to support a claim, while others tended to reduce or eliminate a claim. The claimant may or may not have been fortunate in the result, but I am not persuaded that it is shown that there was error in law in the method of approach.

The other item which is now in question is one of £26 5s. which, as to £21, related to the expense of taking legal advice in connexion with the preparation of the claim for compensation after the receipt of the notice to treat, and as to £5 5s. accountancy expenses similarly incurred. This matter was dealt with by the Lands Tribunal as follows:

> "It was contended by counsel for the acquiring authority that these expenses should be dealt with as part of the costs of the reference in the same way as instructions for writ in an action for damages. This argument appears to us to be based on a false analogy. The defendant in an action does not invite the plaintiff to institute proceedings, while the acquiring authority in their notice to treat demand '. . . from you and each and every of you the particulars of your respective estates and interests in the lands so required as aforesaid together with all charges and interests to which the same are subject and of the claims made by you and each of you in respect thereof which several particulars should be stated in one of the accompanying forms of claim and delivered to the solicitor of the council'. Nothing could be more reasonable on receipt of such a demand than to obtain professional advice and so incur expense which is the direct result of the service of notice to treat. Those expenses are incurred quite irrespective of whether the question of compensation is ever referred at all. Moreover, the claimant may on a reference not be awarded costs, or indeed be ordered to pay the costs of an acquiring authority if the amount awarded is less than the sealed offer, but no sealed offer would have been made unless a claim were first formulated. We are satisfied, therefore, that the costs incurred by a claimant in formulating his claim are proper subjects of compensation. It was admitted by counsel for the claimant that the sums mentioned in the claim included charges in respect of matters subsequent to the reference, and it was agreed between the parties that the appropriate fees would be, legal £21, accountants £5 5s. and surveyors the appropriate scale fee on £800,

the agreed value of the freehold, plus the amount awarded by the tribunal in respect of item 2 (d)."

It was submitted by counsel for the acquiring authority that it was undesirable that legal costs incurred in preparing a claim should be regarded as forming part of the compensation to be awarded. He submitted that such costs could be recoverable as part of the costs of a reference, and as a matter of practical convenience he submitted that the Lands Tribunal was not a suitable tribunal to decide what costs had been properly incurred or what allowances should be made. He submitted that these questions could better be dealt with on a taxation of costs, and, further, that legal costs incurred in making a claim for compensation should not be regarded as capable of being a part of the compensation being claimed. He submitted that any costs properly incurred could be regarded as being costs of a reference, in the same way as costs incurred before an action is brought may be allowed if the taxing master in his discretion considers that they were necessary or proper for the attainment of justice (see *Pêcheries Ostendaises Soc. Anon.* v. *Merchants' Marine Insurance Co.* (1).

It is provided by s. 3 (5) of the Lands Tribunal Act, 1949, as follows:

" Subject to the following provisions of this section, the Lands Tribunal may order that the costs of any proceedings before it incurred by any party shall be paid by any other party and may tax or settle the amount of any costs to be paid under any such order or direct in what manner they are to be taxed ".

In Part 2 of Sch. 1 to the Act para. 5 reads as follows:

" (1) Where the acquiring authority has made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by the Lands Tribunal to that claimant does not exceed the sum offered, the Lands Tribunal shall, unless for special reasons the Lands Tribunal thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as such costs were incurred after the offer was made.

" (2) If the Lands Tribunal is satisfied that a claimant has failed to deliver to the aquiring authority a notice in writing of the amount claimed by him giving sufficient particulars and in sufficient time to enable the acquiring authority to make a proper offer, the foregoing provisions of this section shall apply as if an unconditional offer had been made by the acquiring authority at the time when in the opinion of the Lands Tribunal sufficient particulars should have been furnished and the claimant had been awarded a sum not exceeding the amount of such offer.

" The notice of claim shall state the exact nature of the interest in respect of which compensation is claimed, and give details of the compensation claimed, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated, and when such a notice of claim has been delivered the acquiring authority may, at any time within six weeks after the delivery thereof, withdraw any notice to treat which has been served on the claimant or on any other person interested in the land authorised to be acquired, but shall be liable to pay compensation to any such claimant or other person for any loss or expenses occasioned by the notice to treat having been given to him and withdrawn and the amount of such compensation shall, in default of agreement, be determined by the Lands Tribunal.

(1) [1928] 1 K.B. 750.

" (3) Where a claimant has made an unconditional offer in writing to accept any sum as compensation and has complied with the provisions of the last preceding sub-section, and the sum awarded is equal to or exceeds that sum, the Lands Tribunal shall, unless for special reasons the Lands Tribunal thinks proper not to do so, order the acquiring authority to bear their own costs and to pay the costs of the claimant so far as such costs were incurred after the offer was made."

I need not read sub-paras. (4), (6) and (7).

The question, therefore, arises whether, when compensation is being claimed, an amount to cover the legal costs of preparing the claim can be included. Whether in a particular case it is necessary to have legal assistance in preparing a claim or the services of an accountant will be a matter for decision having regard to the circumstances of the particular case. But if such assistance and such services have properly and reasonably been obtained, then I see no reason why the expense incurred should not be included as part of the compensation claimed. After a notice to treat is served the acquiring authority wish to know what claims are made on them. If they deem the claims to be reasonable they will meet such claims and no reference will be necessary. If legal or other assistance is necessary, and if, in consequence, expense is properly incurred, then, in my judgment, it is appropriate to include the expense as one item in the claim for compensation. If all items of a claim were agreed except an item for such expense, and if the acquiring authority disputed both the necessity for incurring it and also the amount of it, then it seems to me that the dispute could only be resolved by a reference to the Lands Tribunal. So also if the acquiring authority after receiving a notice of claim decided (see para. 5 (2), which I have just read, of Part 2 of Sch. 1 to the Lands Tribunal Act, 1949) to withdraw the notice to treat which it had served, the acquiring authority would be liable to pay compensation for any loss or expenses occasioned by the notice to treat having been given and withdrawn. Such loss or expense might in some cases include expense properly incurred in seeking professional advice. In default of agreement there would have to be a reference to the Lands Tribunal.

It is provided in r. 49 of the Lands Tribunal Rules, 1956, as follows:

" (1) Except in cases to which the provisions of sub-ss. (1), (2) or (3) of s. 5 of the Act of 1919 apply, the costs of and incidental to any proceedings shall be in the discretion of the tribunal.

" (2) If the tribunal directs that the costs of a party to the proceedings shall be paid by any other party thereto, the tribunal may settle the amount of the costs by fixing a lump sum, or it may direct that the costs shall be taxed by the registrar on a specified scale of the scales of costs prescribed by the Rules of the Supreme Court or by the County Court Rules, as the case may be."

It is said that the costs incurred in preparing a claim could be regarded as costs of and incidental to any proceedings. But when a claim is presented following on the request contained in a notice to treat, it may be the hope of both parties that there never will be " proceedings " before the Lands Tribunal. The reason why the acquiring authority ask for a claim to be presented is so that if possible they can amicably agree as to the amount of compensation and so settle all outstanding matters.

Counsel for the acquiring authority referred to *Skinners' Co.* v. *Knight* (1) ([1891] 2 Q.B. 542) where it was decided that under the wording which was used in s. 14 of the Conveyancing and Law of Property Act, 1881, the " compensation "

(1) [1928] 1 K.B. 750

for breach of covenant, which a lessee was liable to pay, did not include the cost incurred by the lessor in consulting and employing a solicitor and surveyor in respect of the preparation of the notice required by s. 14. FRY, L.J., said:

> " With regard to the word ' compensation ', we incline to the view that the word ' damages ' was not used because that is most appropriate to the compensation for a breach when ascertained by the verdict of a jury or the judgment of a court; but that compensation under the section in question is to be measured by the same rule as damages in an action for the breach. But whether this be so or no, we are clearly of opinion that the expenses in question are not payable as compensation for the breach of the covenant. They arise, not from the breach of the covenant, but solely from the fetter which the wisdom of the legislature has imposed on the enforcement of the cause of action arising from that breach."

In the present case the position is quite different. The acquiring authority wished to know what sums were claimed so that if they agreed to pay such sums there would be no outstanding claims. If a claimant could show that he had incurred expense in obtaining professional help, and that it was reasonable for him to have incurred it, and that the figure of his expense was reasonable, then the time for him to ask to be reimbursed was when he responded to the invitation contained in the notice to treat. The incurring of the expense would be a direct consequence of being dispossessed and of being asked to state the amount of the compensation claimed on account of such dispossession. It is to be observed that no question is raised in regard to the fees of a valuer or surveyor. But if such fees, which include fees for assessing the loss of goodwill, are to be regarded as claimable as compensation, it seems difficult to understand why legal or accountancy fees (always provided they are deemed necessary and are properly incurred) should not similarly be regarded as items claimable as compensation.

In my judgment, the Lands Tribunal were in law entitled to hold that the legal expenses and accountants' fees incurred by the claimant formed a proper subject of compensation; accordingly, such fees were correctly included in their award.

WYNN-PARRY, J.: Two questions arise for consideration. The first is whether, and, if so, to what extent, the claimant suffered damage to the goodwill of his business by reason of his having to move his business from 382, Mile End Road, as a result of the compulsory acquisition of those premises by the acquiring authority. The second question is whether the legal costs incurred by the claimant in putting forward his claim following the notice to treat should be treated as part of the compensation payable to him in respect of the compulsory acquisition of the old premises or should be treated as part of the costs of the reference to the Lands Tribunal.

As regards the first question, the Lands Tribunal found that, as a result of moving from 382, Mile End Road, the claimant lost part of the goodwill of his business. That is a finding of fact which we cannot disturb. I would add that, in my view, it is a conclusion which was virtually inevitable. The tribunal have quantified the loss at £750. They have set out in their decision the method by which they have arrived at this figure, and the real question is whether, in adopting this method, they have misdirected themselves. Only if they have done so can this court interfere with their finding. The method applied by the tribunal involved first ascertaining the capital value of the business in the old premises immediately before the transfer; then ascertaining the capital value of the business in the new premises; and then comparing the two. In my judgment, that

was a perfectly proper method to apply. As regards the capital value of the business in the old premises, this was ascertained by taking three years' purchase of the average net profits of the business for the last three years. With that I agree. The capital value of the business in the new premises was ascertained by taking one and a half years' purchase of the average of the net profit for 1955/56 and the estimated net profit for 1956/57. The tribunal took into account the difference in the nature of the two sets of premises their respective situations and the fact that at the new premises a fully qualified assistant is employed.

In the course of their reasoning which led up to the multiplier of one and a half being chosen, the tribunal in their decision said this:

> " In valuing the old business we have decided that the correct method is to multiply the average net profit by three years' purchase as contended for by the claimant, but we have adopted the average profits for three years as contended for by the acquiring authority. In valuing the new business we are unable to accept the evidence of the claiment's advisers that it was unsaleable, or worth at most only one year's purchase. Having regard to our finding that a not inconsiderable part of the goodwill has remained, and to the fact that the net profits of the new business have been substantially higher than those of the old business, and, according to our calculations, have been on the increase, we consider these views to be unduly pessimistic. We are also mindful of the fact that Mr. Moore, in an earlier calculation which he discarded but which was communicated to the acquiring authority by Messrs. Silkin & Silkin in a letter of Feb. 16, 1956, valued the new business at two years' purchase of the net profit."

Then comes their conclusion expressed thus:

> " In the light of all this evidence, we have come to the conclusion that one and a half years' purchase is the appropriate multiplier and this is the figure we have applied. In the result, we calculate the loss sustained under this head of the claim at £750."

Now the duty of the tribunal was to estimate the capital value of the business in the new premises as at the point of time immediately after the move into those premises. Had they been hearing the case at that time any figure at which they arrived would necessarily have been wholly an estimated figure. In fact they were sitting nearly two years after the move. In those circumstances they were bound to have regard to what had actually happened during the interval. That this is so appears clearly from the opinions of LORD MACNAGHTEN and LORD ROBERTSON in *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd.* v. *Pontypridd Waterworks Company* (1). LORD MACNAGHTEN said this:

> " If the question goes to arbitration, the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just and true conclusion it is his duty, I think, to avail himself of all information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark? "

(1) (1957), 121 J.P. 166; [1957] 1 All E.R. 504; [1957] 1 Q.B. 485.

Emg Per.

LORD ROBERTSON said:

"Any estimate of this profit necessarily involves the question, 'How long would the coal in question take to work out?' if for no other reason than in order to compute the cost of working. If the question thus presented has to be solved ab ante, the arbitrator, or whoever has to deal with it, must form the best conjecture he can or probable prices and probable wages during the period required to work out the area in question. But these calculations are resorted to merely in the absence of facts, and not because the time to be considered is that moment of time when the notice of Oct. 15, 1898, was presented. And if, owing to the course of the procedure, the period required for the working out of the coal in question has come to be a matter of history, then estimate and conjecture are superceded by facts as the proper media concludendi. I do not mean that the proper course in awarding compensation is to wait for the expiry of the period required for working out the coal. On the contrary, it is natural that the compensation should be assessed once for all and by estimate. But the point is that as in this instance facts are available, they are not to be shut out."

As I read those passages, they do not mean that in making an estimate, such as the one which fell to be made in this case, one is necessarily to stop at the end of the period covering the known facts. If one considered alone the first passage from the decision, which I have quoted earlier, it might well be said that the tribunal had confined their consideration to what, at the date of the hearing, were events in the past; but when the decision is considered as a whole, I do not think that such a conclusion is justified. The period which they have considered as regards the calculation of the capital value of the business in the new premises is not only the financial year 1955/56, but the year 1956/57 in respect of which latter period the net profits were not known at the date of the hearing but had to be estimated for at least the last two months. Up to this point, therefore, I am unable to conclude that the tribunal have misdirected themselves.

The question then remains: Have they erred in principle in taking into account only a period of two years for the purpose of estimating the capital value of the business in the new premises, whereas they took a period of three years in estimating the capital value of the business in the old premises? In this regard it is to be noticed that in estimating the capital value of the business in the old premises the tribunal took the period of three years at the request of and, therefore, presumably in favour of the acquiring authority. Neither the case nor the decision inform us what the net profits for the year 1955/56 were in fact, nor what figures, if any, for the year 1956/57 beyond the figure of gross profits for ten months the tribunal had before them in deciding to adopt a two-year period; but, in the absence of such figures, I do not see what material this court has before it which would enable it to say that in choosing a two-year period rather than a longer one the tribunal has misdirected itself. Nor do I see that the case could properly be referred back to the tribunal with a view to this information being furnished. It follows, I think, from this that equally this court has no ground for holding that the adoption of the multiplier of one and a half amounted to a misdirection. For these reasons, I am of opinion that the finding of the tribunal on the first point should not be disturbed.

The second question is posed by the tribunal in effect in this way: whether on the findings of fact they came to a correct decision in law in determining that the legal expenses and accountants' fees incurred by the claimant in preparing his claim in response to the notice to treat formed a proper subject of compensation and were correctly included in their award? In my view,

the tribunal were right. It can be said, or course, and it was said, that it is unsatisfactory that the legal costs of compiling the claim, and the legal costs incurred in prosecuting a reference, if there should be a reference, should be assessed, to use a mutual phrase, by different persons; the first set of legal expenses by the tribunal in investigating the claim, and the second set by the registrar of the tribunal or a taxing master. I have some sympathy for this view, but I do not see how it could prevail, short of some statutory modification of the Lands Tribunal Act, 1949, providing that legal costs incurred in compiling a claim should be subject to taxation whether or not the claim was followed by a reference. As matters stand at present, on notice to treat the claimant and his advisers compile a claim. Let me assume a case in respect of which there is no subsequent reference. In compiling the claim the claimant has to incur legal costs. In order to arrive at a true figure of the loss which he has incurred, he is forced to include the amount of such legal costs, otherwise his claim is for less than the loss which he has suffered. On what principle can it be said that, if there should be a reference, the amount of his loss is to be reduced for the purposes of the reference by the whole of the amount of the legal costs which he has incurred? The Lands Tribunal Act, 1949, s. 3 (5), only deals with the costs of a reference; the Lands Tribunal Rules, 1956, made pursuant to the Act are wider in form, because r. 49 refers to costs of and incidental to the reference, but, assuming without deciding that r. 49 is intra vires, I cannot see how the words " incidental to " can take the costs out of the only place where they can find room prior to a reference, namely, the claim itself, and make them any part of the costs of the reference. In the result, I would dismiss this appeal.

SELLERS, L.J., (read by MORRIS, L.J.): I have read the judgments of both MORRIS, L.J., and WYNN-PARRY, J. I agree with them and have nothing I wish to add to them.

Appeal dismissed.

Solicitors: *Solicitor, London County Council; Silkin & Silkin.*

H.S.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J.)

March 2, 3, 1959

STEPHENS *v.* CUCKFIELD RURAL DISTRICT COUNCIL

Town and Country Planning—Amenity—Injury—Abatement—Injury by condition of open land—Inclusion of land within curtilage of building—Town and Country Planning Act, 1947 (c. 51), *s.* 33 (1).

By the Town and Country Planning Act, 1947, s. 33 (1), if it appears to a local planning authority that the amenity of any part of the area of that authority is seriously injured by the condition of " any garden, vacant site or other open land " in their area, they may serve a notice on the owner of the land requiring him to abate the injury in the way specified in the notice. The plaintiff owned certain land which, from 1939 to 1955, he had used as a sawmill, for which purpose he had erected structures on the land. He used the land surrounding the structures as a sawmill yard. In 1955 he let the land to a company who used it for breaking up vehicles and adapting the component parts for sale. The breaking up of the vehicles was carried out both in the structures and in the surrounding yard. In April, 1957, the local planning authority served on the plaintiff, a notice purporting to be a notice under s. 33 of the Act of 1947, requiring him to move all cars, car bodies and machinery from the " open land within the curtilage " of the premises.

HELD: on its true construction, s. 33 must be limited to cases where the " garden, vacant site or other open land " was not within the curtilage of a building.

ACTION by the plaintiff, Horace John Stephens for a declaration that a notice served on him under s. 33 of the Town and Country Planning Act, 1947, by Cuckfield Rural District Council, the defendants (who were the local planning authority), was invalid.

The plaintiff was the owner of certain land at Pease Pottage, in the county of Sussex. The land included a part of Tilgate Forest, situated to the north of Parish Lane, Pease Pottage, which, from 1939 to 1955, was used by the plaintiff as a sawmill. For the purpose of the sawmill the plaintiff had erected structures on the land and he used the land which surrounded the structures as a sawmill yard. In about November, 1955, the Tilgate Forest land was let by the plaintiff for use by Sussex Car Breakers, Ltd., who used the land for breaking up vehicles and adapting the component parts for sale. The breaking up of the vehicles was carried out both in the structures themselves and in the yard surrounding them. At the date of this action, the premises and the surrounding yard were still being used for breaking-up vehicles. On Apr. 3, 1957, the defendants served on the plaintiff a notice, purporting to be a notice under s. 33 of the Act of 1947, which read:

> "It appears to [the local planning authority] . . . that the condition of the open land within the curtilage of the premises to the north of Parish Lane, Pease Pottage . . . is causing serious injury to the amenity of part of the area of [the local planning authority]. [The local planning authority] in accordance with s. 33 of the Act . . . require for the purpose of abating the injury to the amenity of the area that within six weeks of the date on which this notice takes effect . . . steps . . . shall be taken . . . to remove from the said land all cars car bodies and machinery."

The notice was stated to take effect on May 8, 1957. By s. 33 of the Act of 1947 a local planning authority is empowered to serve a notice where the amenity of any part of the area of the authority is injured by the condition "of any garden, vacant site or other open land" in their area. On May 6, 1957, the plaintiff appealed against the notice to the magistrates' court under s. 23 (4) of the Act of 1947 (as modified by regulations for the purpose of notices served under s. 33). The appeal was dismissed, and on Aug. 24, 1957, the plaintiff appealed from that decision to quarter sessions; from the dismissal of the appeal by quarter sessions, the plaintiff appealed by way of Case Stated to the Divisional Court and that appeal was also dismissed.

The plaintiff now sought a declaration that the land within the curtilage of the premises at Tilgate Forest was not a garden, vacant site or other open land within the meaning of s. 33 and, therefore, that the notice served on him by the defendants had no effect in law.

Baker, Q.C., and *R. M. Bell* for the plaintiff.
Kerrigan for the defendants, the local planning authority.

LORD PARKER, C.J.: This case raises a point on which, as far as I know, there is no authority, and which is a point of some difficulty. It is a point as to the construction of s. 33 of the Town and Country Planning Act, 1947. The matter has had a rather chequered history in that, as I shall describe in a moment, there have already been proceedings in the magistrates' court, an appeal to quarter sessions and an appeal by way of Case Stated to a Divisional Court.

[HIS LORDSHIP, having referred to the facts and to the notice which was served on the plaintiff, continued:] Section 33 (1) of the Act of 1947, under which the notice was given, is in these terms:

> "If it appears to a local planning authority that the amenity of any part of the area of that authority, or of any adjoining area, is seriously injured by the condition of any garden, vacant site or other open land in their area, then, subject to any directions given by the Minister, the authority may serve on the owner and occupier of the land, in the manner prescribed by regulations under this Act, a notice requiring such steps for abating the injury as may be specified in the notice to be taken within such period as may be so specified."

By sub-s. (2) of s. 33 it is provided that there may be an appeal in the manner provided with regard to an enforcement notice under s. 23 (4) of the Act of 1947, subject to modifications to be made by regulations. [HIS LORDSHIP referred to s. 23 (4) of the Town and Country Planning Act, 1947, as modified by the Town and Country Planning (General) Regulations, 1948 (S.I. 1948 No. 1380), and to the previous appeals on the ground that the change from use of the land as a sawmill to use for car-breaking was a change of use from general industrial user to light industrial user, that there was permission for such a change under the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), Sched. I, Part I, Class III, and that, therefore, the notice must be quashed as "permission was granted" for the car-breaking use within s. 23 (4), and, having indicated that the jurisdiction on appeal under s. 23 (4) was limited and did not extend to deciding the question now raised, he continued:] Accordingly, in these proceedings the plaintiff claims a declaration that the original notice was void ab initio for the reason that this was not land to which s. 33 applied.

It is a short point and not an easy one. The words of the section which I have already read seem to me to be very wide. The section applies to any "garden, vacant site or other open land", and it seems to me that those three phrases taken together are describing in the widest possible terms any land on which there is no building, land which is not built up. The reason, no doubt, for the use of the words "open land" in that way is to make it perfectly clear that the draftsman is departing from the definition of "land" in s. 119 of the Act of 1947, where "land" is described as including buildings. That, of course, is subject to the provision that the context should not otherwise require, and it seems to me that s. 33 is dealing with any land which has not got a building on it. That, as it seems to me, is the literal interpretation.

The sidenote of s. 33 is in these terms: "Power to require proper maintenance of waste land, etc." It seemed to me at one time that if one was entitled to look at the sidenote, and, indeed, from the very wording of s. 33, it might be said that Parliament had in mind the case of permissive waste, allowing a garden, for instance, to run to seed, and a vacant site to become unsightly; but I am quite clear, on further consideration, that there is no such limitation in this case. In particular reg. 7 (2) (b) of the Town and Country Planning (General) Regulations, 1948, modifies s. 23 (4) (a) of the Town and Country Planning Act, 1947, to read:

> "if satisfied that the condition of the land to which the notice relates is such as results in the ordinary course of events from operations or a use for which permission was granted . . ."

That clearly envisages not permissive waste, not an allowing of the land to run to seed, but active operations and user of the land; and, accordingly, prima facie it seems to me that this section covers any operations or user of any open land in the sense of any land which is not built on.

Counsel for the plaintiff, however, argues with considerable force that, though that may be the literal interpretation as a matter of construction, reading this section in the scheme of the Act as a whole, a limitation must be put on the words " garden, vacant site or other open land ". In particular he says that if no limitation at all is put on those words, then it would follow that under these additional powers of control, beginning with s. 26 and ending with s. 33, there is power to prevent the continued user of land which is only being used for a legitimate existing use purpose and a purpose in connexion with buildings. He points out that, if that were so, it would enable the local planning authority, if they decided that the amenity of the neighbourhood was being injured, in effect to force somebody who had been carrying on a business there for some time to close down—for, I suppose, there are many users for general industrial purposes which cannot be carried on solely within the confines of the building, such as a builder's yard, or scrap heap, or something like that, which is vital for the carrying on of the business. Surely, said counsel for the plaintiff, Parliament could not have intended that s. 33 should operate in that way. There is clearly no power in regard to the building itself to prevent the continued existing use user, and if s. 33 were operated it would do in a back-handed way something which under the Act there was no power to do directly.

It is a formidable argument and, as I understand it, counsel for the local planning authority faces that position, but says that it is not quite as bad as it seems, because s. 33 will, in fact, only operate in that back-handed way in a case where the use, though within the class of general industrial use, is a user which will affect amenities. He says that it may be put in this way. Supposing a sawmill had been carried on there; then there would have been originally, or there might be, no loss of amenity, the premises could still be carried on for the sawmill and no objection would be taken. The mere fact, however, that as sawmilling is a general industrial user there can be a change to car-breaking does not, he says, prevent the local planning authority from saying that the new user, though lawful, is an injury to amenity. It follows, therefore, that even in that limited respect s. 33 is being used to do something for which there is no direct power, namely, to prevent a person carrying on an existing use business for which there is no interference short of giving a notice under s. 26 and paying compensation.

It is not an easy point, but I am inclined, on the whole, to accept the contention of counsel for the plaintiff and to say that s. 33 of the Town and Country Planning Act, 1947, properly construed, must be limited to a case where, at any rate, the garden, vacant site or other open land is not within the curtilage of a building and has not, as it were, acquired the user of that building. Counsel points, in support of that contention, to the fact that in many places in this scheme of legislation " building " does include, at any rate, the curtilage, and, as is conceded, s. 33 cannot apply to buildings; so that, if one considers that in the treating of buildings under the Act there is included the curtilage, then there is every reason for construing s. 33 (1), as applying to open land which does not form part of the curtilage. The references that he makes are, first, to s. 12 (2) (d), which is the only occasion where curtilage is specifically referred to. That is a proviso to the necessity for obtaining permission for development, saying that, in effect, permission is not required for the use of any building or other land within the curtilage of a dwelling-house for any purpose incidental to the development of the dwelling-house as such. Counsel also points to the Use Classes Order of 1948, where in reg. 2, para. 2, there appear these words at the very end:

"... and references to a building may, except where otherwise provided, include references to land occupied therewith and used for the same purposes."

Curtilage is not referred to. It is dealing with the case where the land in question is, as it were, part and parcel of the building occupied and used for the same purpose as the building. In other words, to take the present case, if this had been a change to a light industrial use from a general industrial use, then the permission to do that would cover, not merely the building itself, but would, undoubtedly, cover this yard or area of land round the building.

In order to make sense of this scheme of legislation and to avoid the absurdity to which I have referred, one must limit the words, "garden, vacant site or other open land", to a garden, vacant site or other open land which is, at any rate, not within the curtilage of a building. I appreciate that that may give rise to questions in some cases as to what is, and what is not, within the curtilage of a building, and indeed it may be that the curtilage is not the right test, but that the test is whether, as in the Use Classes Order, the land is occupied with and used for the same purposes as the building; but so far as the present case is concerned, there is no difficulty, because the notice itself is specifically dealing with the condition of open land within the curtilage of the premises.

Accordingly, on the view which I take of the section, the notice of April, 1957, was a nullity, and I suppose that all the proceedings that have been taken since have all been nullities. I would hold that the plaintiff is entitled to the declaration claimed, which is a declaration that the land in question is not a garden, vacant site or other open land within the meaning of s. 33 of the Act of 1947, and that the notice served by the local planning authority on the plaintiff on Apr. 3, 1957, is of no effect in law.

Declaration accordingly.

Solicitors: *Iliffe, Sweet & Co.; Sharp, Pritchard & Co.*, for *Clerk to Cuckfield Rural District Council.*

G.A.K.

CHANCERY DIVISION

(VAISEY AND HARMAN, JJ.)

March 5, 6, 1959

Re HASTINGS

Habeas Corpus—Criminal matter—Application refused by Divisional Court of Queen's Bench Division—Right to apply to Divisional Court of Chancery Division.

The applicant for a writ of habeas corpus in a criminal matter who had had his application refused by two Divisional Courts of the Queen's Bench Division composed of different judges, made a similar application on the same grounds to a Divisional Court of the Chancery Division.

HELD: the applicant had no right to go from Division to Division or from judge to judge of the High Court of Justice, for when the Divisional Court of the Queen's Bench Division, the proper court according to the rules, had made an order (which was an order of the one High Court of Justice) deciding the application, the matter was finally concluded, and, therefore, the Divisional Court of the Chancery Division had no jurisdiction to hear the application.

Application for habeas corpus.

The applicant, Edward Thomas Hastings, was convicted at the Liverpool Crown Court on an indictment containing five counts, the first for larceny, and

the others for obtaining money by false pretences and fraudulent conversion. He was sentenced by the recorder to four years' corrective training, which was not expressly stated to be on each count, to run concurrently. On appeal to the Court of Criminal Appeal, on Dec. 18, 1957, the conviction on the first count was quashed, but the sentence was not altered. The applicant then obtained leave to apply to a Divisional Court of the Queen's Bench Division for a writ of habeas corpus, the grounds of the application being that he was illegally detained in prison as the sentence was a general sentence on the five counts, and, the conviction on one count having been quashed, there was no legal sentence applicable to the other four counts. The application was heard on Mar. 7, 1958, by a Divisional Court of the Queen's Bench Division consisting of Lord Goddard, C.J., Streatfeild and Slade, JJ., who refused the writ, holding that, as a matter of construction, the words used by the recorder in passing sentence amounted to the passing of concurrent sentences of four years' corrective training on each count so that the quashing of the conviction on one count had no effect on the sentence, which remained valid: see 122 J.P. 283. On July 28, 1958, the applicant appealed to the Court of Appeal, who refused to entertain the appeal on the ground that it arose in a criminal cause or matter, and he then obtained leave to apply for habeas corpus, on the same facts and grounds, to another Divisional Court of the Queen's Bench Division differently constituted. The application was heard on Nov. 4, 1958, by a Divisional Court of the Queen's Bench Division consisting of Lord Parker, C.J., Hilbery and Diplock, JJ., who refused the writ holding that as his application had been heard by a Divisional Court of the Queen's Bench Division the applicant was not entitled to be heard on another application based on the same facts and grounds by another Divisional Court of the same Division: see 123 J.P. 79.

The applicant now applied to a Divisional Court of the Chancery Division for a writ of habeas corpus directed to the governor of Liverpool Gaol. A preliminary point was raised by the respondent that there was no power under statute or rule to set up a Divisional Court of the Chancery Division to hear the application; but by s. 46 of the Supreme Court of Judicature Act, 1873, it was provided that "Subject to any rules of court, any judge of the High Court, sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court, may reserve . . . any point in a case, for the consideration of a Divisional Court . . ." HARMAN, J., withdrew to enable VAISEY, J., to exercise his jurisdiction elsewhere than in a Divisional Court; and returned when VAISEY, J., had reserved the point for consideration of a Divisional Court. The respondent then raised the point that, the applicant having already obtained the opinion of the High Court on his application, there remained no jurisdiction in any part of the High Court to entertain his application.

Butter for the applicant.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*), and *Rodger Winn* for the respondent.

VAISEY, J., referred to the origin of the matter in the sentence passed at the Liverpool Crown Court, to the application to the Court of Criminal Appeal and to the applications for a writ of habeas corpus to two Divisional Courts of the Queen's Bench Division, with regard to the second of which HIS LORDSHIP continued: That came before LORD PARKER, C.J., who had succeeded LORD GODDARD as Lord Chief Justice, and produced from him a most illuminating judgment. He dealt with the position in the past and in the present. He pointed out that the old practice by which the applicant for a writ of habeas corpus could go from court to court until he got satisfaction had been abrogated

by the fact that since the year 1873 there had only been one court, so that there was no question of going from court to court: see 123 J.P. 79, 80.

There then came the further question, which my Lord considered, whether the practice of going from judge to judge still subsisted, and there is no doubt that a certain amount of judicial authority would seem to point to the fact that that right is still an existing right. LORD PARKER, C.J., explained the ancient practice about the necessity of finding someone to deal with an application during vacation. In those days, when a far greater part of the year was taken up by law vacations than is at present, when the courts were not sitting in banc, if relief was wanted it was necessary to apply to a judge, because that was the only way of ascertaining the will of the judicature. LORD PARKER, C.J., thought that, having regard to modern conditions, that right had been practically abrogated. The rule now is that an application for a writ of habeas corpus must be to a Divisional Court, and it is a little hard to see, if there is a right to go from judge to judge, what a judge would do when the application was made to him. One would think that all that he could do properly was to have the matter referred to a Divisional Court, and then the applicant would be really where he was if there had been no such right of going from judge to judge as I am now mentioning.

LORD PARKER, C.J., in his judgment, on that second attempt of the present applicant, came to this final conclusion. He said this:

> "... the applicant having already once been heard by a Divisional Court of the Queen's Bench Division [that being, of course, the previous hearing before LORD GODDARD, C.J., and two judges] is not entitled to be heard again by another Divisional Court of the same division."

I venture to think that it would have been perfectly possible, and I think logical, if LORD PARKER, C.J., had said, "He is not entitled to be heard again by any tribunal carved out of the one single tribunal, the High Court". But LORD PARKER, C.J., doubtless was confining himself to the point which was strictly in issue. As the rules provide that such applications must go to a Divisional Court of the Queen's Bench Division, the sentence which I have just read means, I think, that the decision which he was then giving on the second application of the applicant for the issue of a writ of habeas corpus was really that there had been an end of the case when the matter was before LORD GODDARD, C.J. LORD PARKER, C.J., did not think there was anything more that could be done.

The applicant expressed his anxiety to come to the Chancery Division. The application is based, I think, on a complete misconception. The mistake that the applicant made is to assume that the Chancery Division is a separate entity, a separate court, and that either by single judges or by a Divisional Court it can deal with the matter afresh. The applicant uses an expression which, I think, he must suppose to be flattering to us who are sitting here. He says —and I am now quoting from his own affidavit—he has decided to come to a "*complete* hearing before a hitherto unconnected and impartial Bench. This I seek in the Chancery Court". I hope that this is an impartial Bench, but it is not an independent Bench. Indeed, as LORD PARKER, C.J., has ruled, and with, I think, perfect accuracy, as soon as the Divisional Court of the Queen's Bench Division has come to its conclusion there is an end of the matter. It always has to be remembered that an order is not an order of any particular division or any particular Divisional Court; an order is an order of the High Court. It is beyond my comprehension how we here, judges of the High Court, could be heard to overrule or otherwise interfere with a judgment which was

the result of LORD PARKER, C.J.'s hearing before his Divisional Court—how we could be heard to say that the conclusion and the order of our own court, the only court which exists, the High Court of Justice, was wrong, and to say that something else should be done.

When LORD PARKER, C.J., came to a conclusion in the Queen's Bench Divisional Court, acting strictly under the rules, he finally disposed of the application of this present applicant to have a writ of habeas corpus issued to him. I cannot see how this court, or we who are all judges of the High Court, could stultify a decision of the High Court of which we are ourselves constituent parts.

It is a curious thing how hardly this idea of the separate courts dies. One comes across it in many connexions. The Habeas Corpus Act was passed in the reign of Charles II—and we all remember how that monarch with his graceful courtesy apologised to those who surrounded his deathbed for being an unconscionable time a-dying. " Unconscionable time a-dying " is certainly predicated of those courts which we thought were ended, died and were buried, in the year 1873, and yet continually emerge in the minds and in the speech of English people as if they still existed. We are constantly hearing of the " Court of Chancery ". It is three generations since there was such a court. " The Court of Queen's Bench " is referred to in just the same way. There is only one court. There is nothing wrong with these expressions provided that it is always remembered that we who make orders, sitting either as judges dealing with Chancery cases or as judges dealing with Queen's Bench cases, make orders of the High Court, not of our own particular branch or part or emanation of it, but of the one High Court of Justice on behalf of which we all act.

I have no doubt that much more is known to the public about wards of court from the pages of Charles Dickens' novel Bleak House than can be discovered in text-books or historical books of reference. Apart from that a good deal of colour is lent to the suggestion of separate courts by such expressions as " a Chancery judge " or " a Queen's Bench judge ", which mean, respectively, a judge who has been assigned to do the work which is commonly denominated Chancery work, and a judge who is assigned to work which used to be in the old Court of Queen's Bench. By the Supreme Court of Judicature (Consolidation) Act, 1925, however, the description under which we are appointed is " Justice of the High Court ". The main fact which I wish to emphasise in this case is that there is but one High Court. The " Supreme Court " is an expression with a different meaning. There is one High Court to which all Her Majesty's puisne judges, as they are called, belong. Although it is perfectly proper that I or HARMAN, J., should criticise, or indeed on occasions depart from or refuse to follow a decision which is reached in the Queen's Bench Division, it is quite impossible for us to interfere with an order made there in the same manner.

In this case the Divisional Court of the Queen's Bench Division has reached a decision. For my part I think that we have no jurisdiction to hear this application and I am in favour of dismissing it.

HARMAN, J.: I concur in the conclusion at which my Lord has arrived. It is always sad to be stripped of any illusion, and I, like, I expect, most lawyers, have grown up in the belief that in cases of habeas corpus the suppliant could go from judge to judge until he could find one more merciful than his brethren. That illusion was stripped from me when I read the report of the decision in the Queen's Bench Divisional Court last year in this very case. The decision was based on this, I think, that there never had been such a right. There had been a right to go from court to court; there had been a right in Vacation to go from judge to judge, for the simple reason that the court was not sitting in banc;

but there had never been a right in term time to go from one judge to another when the court was available to which the applicant should properly apply.

Counsel for the applicant, for whose argument I for one am much indebted, said that the clou of his case was this, that there still was this right to go from judge to judge, and that if that were not so the whole structure would come to the ground. He naturally relied very strongly on the decision of the Privy Council in *Eshugbayi Eleko* v. *Nigeria Government* (*Administering Officer*) (1), to which we were referred, and no doubt if the observations of LORD HAILSHAM, L.C., there are justified there is much to be said for the existence of the right. I must confess, however, to have had my belief in that judgment very much shaken by the Irish case to which LORD PARKER, C.J., referred and the very cogent judgment of FITZGIBBON, J., in that case, *The State* (*Dowling*) v. *Kingston* (*No. 2*) (2).

I think that the judgment of the Queen's Bench Divisional Court did make it clear that this supposed right was an illusion. If that be right, the rest follows. Nobody doubts that there was a right to go from court to court, as my Lord has already explained. There are no different courts now to go to. The courts that used to sit in banc have been swept away and their places taken by Divisional Courts, which are entirely the creatures of statute and rule. Applications for a writ of habeas corpus are assigned by the rule to Divisional Courts of the Queen's Bench Division, and that is the only place to which a suppliant may go. He will, in the first instance, it is said, have a right to go to one judge, but the only result of that, except in a case of the most extreme urgency, would be that the judge would direct him to go on to the proper tribunal, namely, the Divisional Court. Even if the right to go from one to another were now existing it would not, in practice, be any bulwark of the liberty of the subject, for the only result of going from one judge to another would be that the applicant would find himself before the Divisional Court. Nobody doubts that if he has a decision of the Divisional Court then he will not be able to get it again.

LORD PARKER, C.J., and his colleagues were very cautious not to go further than the court, so to call it, of Queen's Bench. It may be that they were afraid of treading on Chancery toes; and so the applicant was encouraged, it may be by the very limitation of the language, to present himself before this tribunal. Logically, however, as my Lord has already observed, the judgments pronounced in the Queen's Bench Divisional Court apply to the whole High Court of Justice, and it was only diffidence that prevented our brethren of the Queen's Bench from saying so. In my judgment this application, therefore, is precluded by the absence of the ancient but imaginary right to go round and round and round from judge to judge when the term is in progress. There never was such a thing; there is not now; and this applicant, having had the judgment of the High Court, cannot have another one.

I concur respectfully in what LORD PARKER, C.J., says at the end of his judgment, namely, that it does seem a pity that, this being a criminal case, there is no appeal. It would seem it would be a good step, as LORD GODDARD, C.J., was frequently heard to observe, if there was a right or some means of taking a case like this to the House of Lords in order that the subject should not feel that he had a grievance. But that is a matter not within our province. All we can do is to dismiss the application. *Application dismissed.*

Solicitors: *Official Solicitor*; *Treasury Solicitor.*

R.D.H.O.

(1) [1928] A.C. 459.
(2) [1937] I.R. 699.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., DEVLIN, DONOVAN, MCNAIR AND HINCHCLIFFE, JJ.)

March 9, 23, 1959

R. *v.* COOK

Criminal Law—Evidence—Character of prisoner—Cross-examination on previous convictions—Imputation on character of Crown witness—Discretion of judge—Criminal Evidence Act, 1898 (61 *and* 62 *Vict., c.* 36), *s.* 1, *proviso* (*f*) (ii).

The appellant was charged at quarter sessions with obtaining a car by false pretences and receiving cheque forms knowing them to have been stolen. A detective-constable who gave evidence for the prosecution said that when the appellant was charged he admitted that he had got the car "on a dud cheque". Later, the appellant made a statement in writing in which he said that he had found the cheque book in the road. The appellant, who conducted his own defence, in the course of his cross-examination of the detective-constable suggested that the statement had been obtained from him by a threat that, if he did not speak, his wife would be charged. This was denied by the constable. The appellant later gave evidence himself and in the course of cross-examination repeated the allegation. Counsel for the prosecution then said that he wished to put "certain further questions". The chairman said that, while counsel was strictly entitled to do so, he himself would have thought it would not be necessary. Counsel then put to the appellant, and the appellant admitted, a number of previous convictions.

HELD: now that it was clearly established that the judge had a discretion whether to allow cross-examination of this kind or not, there was no need to strain the words of proviso (f) (ii) to s. 1 of the Criminal Evidence Act, 1898, "unless . . . the nature or conduct of the defence is such as to involve imputations on the character of . . . the witnesses for the prosecution", in the favour of the defence, as had been done by several authorities, and the words should now be given their natural meaning; applying these principles to the present case, the court was of opinion that there had been an imputation on the character of the police officer within the meaning of the proviso, but the court were not satisfied that the chairman had exercised his discretion at all, because he thought that the prosecution were entitled to put the questions as of right and no warning had been given to the appellant either by counsel or the chairman that he was going too far, and it was the inevitable practice that this should be done; in these circumstances the court must hold that the cross-examination was inadmissible, but, as they were of opinion that no substantial miscarriage of justice had arisen by reason of the irregularity, they would apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, and affirm the conviction.

APPEAL against conviction.

The appellant was convicted at Somerset Quarter Sessions of obtaining a motor car by false pretences and receiving five bankers' cheque forms, knowing them to have been stolen, and was sentenced to concurrent terms of four years' and three years' imprisonment. The witnesses for the prosecution included Det.-Con. Thomas, who stated in evidence that when the appellant was charged he said that he made out a cheque himself and admitted that he had got the car "on a dud cheque." Later, the appellant made a statement in writing in which he said that he found the cheque book in the road. The appellant, who conducted his case in person, in the course of his cross-examination of the detective constable suggested that the statement had been obtained from him by a threat that, if he did not speak, his wife would be charged. This was denied by the constable. The appellant later gave evidence himself and in the course of cross-examination repeated the allegation. Counsel for the prosecution then said that he wished to put "certain further questions". The chairman said that, while counsel was strictly entitled to do so, he himself would have thought it would not be necessary. Counsel then put to the appellant,

and the appellant admitted, a number of previous convictions. The appellant appealed on the ground that the cross-examination was inadmissible.

By s. 1, proviso (f), of the Criminal Evidence Act, 1898:

> " A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution . . ."

N. R. Blaker for the appellant.

Inskip for the Crown.

Cur. adv. vult.

Mar. 23. **DEVLIN, J.,** read the following judgment of the court. On Sept. 26, 1958, the appellant was sentenced at Somerset Quarter Sessions to a term of four years' imprisonment for obtaining a motor car by false pretences and to a term of three years concurrent for receiving five banker's cheque forms knowing them to have been stolen. On Mar. 9, 1959, this court heard his appeal against conviction and sentence and dismissed it. There is only one point in the appeal that deserves serious consideration and that is the contention that the appellant was improperly cross-examined about his previous convictions.

The facts that are relevant to it can be shortly stated. On July 9, 1958, the premises of Ackland & Pratten, Ltd. were broken into and among the property missing were five cheque forms. On July 25 a Mr. Long, who lives at Nailsea near Bristol, advertised a Humber Hawk motor car for sale. On July 28 he was rung up by a woman, who said that she was Mrs. Pratten and who arranged to buy the car. The appellant's wife was joined with him in the indictment and it appears that the case for the prosecution against her was that she falsely pretended to be Mrs. Pratten. Separate trials were ordered and we are concerned only with the case against the appellant. Later, on July 28, the appellant telephoned Mr. Long to say that he was bringing round a cheque from Mrs. Pratten and would collect the car. The appellant came and represented himself to be an employee of Ackland & Pratten, Ltd., a concern well known to Mr. Long. Mr. Long let him take away the car in exchange for a cheque for £430 signed G. E. Pratten. The cheque was on one of the stolen forms and the signature on it was fictitious.

The witnesses for the prosecution included Detective Constable Thomas who gave evidence that on Aug. 3, when the appellant was charged, he said that he made out the cheque himself and that he admitted that he had got the car on a dud cheque. Later the appellant made a statement in writing in which he said that he found the cheque book in the road dumped down by the side of the wall. The appellant conducted his case in person, and in the course of his cross-examination of the police officer he suggested that the statement had been obtained from him by means of a threat that, if he did not speak, his wife would be charged. This suggestion was denied. The appellant later gave evidence on his own behalf and in answer to questions in cross-examination about his statement to the police he again said that he had made them under the threat that his wife would be charged. On that counsel for the prosecution indicated that he wished to put " certain further questions ". The learned chairman said that, while counsel was, strictly, entitled to do so, he would have thought

that it would not be necessary. Counsel then put to the appellant, and the appellant agreed, that he had a long record of crime behind him; details of various convictions for offences of dishonesty were then put. In the circumstances of this case and under the provisions of the Criminal Evidence Act, 1898, s. 1, proviso (f) (ii), those questions were permissible only if the nature or conduct of the defence were such as to involve imputations on the character of Detective Constable Thomas.

It is clear from the sub-section as a whole that it does not intend that the introduction of a prisoner's previous convictions should be other than exceptional. The difficulty about its phraseology is that, unless it is given some restricted meaning, a prisoner's bad character, if he had one, would emerge almost as a matter of course. Counsel for the defence could not submit that a witness for the prosecution was untruthful without making an imputation on his character; a prisoner charged with assault could not assert that the prosecutor struck first without imputing to him a similar crime. The authorities show that this court has endeavoured to surmount this difficulty in two ways. First, it has in a number of cases construed the words as benevolently as possible in favour of the accused. Secondly, it has laid it down that in cases which fall within the words the trial judge must not allow as a matter of course questions designed to show bad character; he must weigh the prejudicial effect of such questions against the damage done by the attack on the prosecution's witnesses and must generally exercise his discretion so as to secure a trial that is fair both to the prosecution and to the defence.

The judgments in many of the earlier cases are based on a limited construction of the statute. Thus in *R.* v. *Rouse* (1) it was held that a statement by the prisoner in cross-examination that the prosecutor was a liar must be regarded only as an emphatic denial of the truth of the charge against him and did not enable the prosecution to put his character in issue. Cases of rape have given rise to a peculiar difficulty; the prisoner cannot assert that the connexion was with the consent of the prosecutrix without making imputations against her chastity. There was for a long time a difference of opinion about the effect of this; it was not definitely settled in favour of the defence until *R.* v. *Turner* (2), a case which was shortly after approved by the House of Lords in *Stirland* v. *Public Prosecutions Director* (3). At the same time this court has refused as a general rule to read into the section words that are not there. This was plainly laid down by a full court in *R.* v. *Hudson* (4) in the following terms:

> "We think that the words of the section, 'unless . . . the nature or conduct of the defence is such as to involve imputations', etc., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily', or 'unjustifiably', or 'for purposes other than that of developing the defence', or other similar words."

We need not go through the cases in detail. They were all carefully reviewed in the Scottish case, *O'Hara* v. *H.M. Advocate* (5), and the effect of them is succinctly stated by the Lord Justice-Clerk (LORD THOMSON) as follows:

> "The net result seems to be that the Court of Criminal Appeal in England

(1) 68 J.P. 14; [1904] 1 K.B. 184.
(2) [1944] 1 All E.R. 599; [1944] K.B. 463.
(3) 109 J.P. 1; [1944] 2 All E.R. 13; [1944] A.C. 315.
(4) 76 J.P. 421; [1912] 2 K.B. 464.
(5) 1948 S.C. (J.) 90.

adheres to *R.* v. *Hudson* (1) with certain modifications in cases of rape and subject to the discretionary power of the presiding judge."

Since then *R.* v. *Hudson* (1) has been again applied by this court in R. *v. Clark* (2).

The alternative approach to the problem has been by the application of the general rule that the trial judge must always exercise his discretion so as to prevent the introduction of material whose prejudicial effect would outweigh its evidential value. The point that under this sub-section the judge had a discretion was first made by VISCOUNT SANKEY, L.C., in *Maxwell* v. *Director of Public Prosecutions* (3). It was made again by VISCOUNT SIMON, L.C., in *Stirland* v. *Public Prosecutions Director* (4). The principle was first elaborated in *R.* v. *Jenkins* (5). In that case this court re-affirmed *R.* v. *Hudson* (1) and then dealt with the question of discretion. SINGLETON, J., said:

"The sub-section was intended to be a protection to an accused person. A case ought to be tried on its own facts and it has always been recognised that it is better that the jury should know nothing about an accused's past history if that is to his discredit. Just as it was recognised by the legislature that this was fair and proper, so it was recognised that, if the nature or conduct of the defence was such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, it was equally fair and proper that the prosecution should have the right to ask questions tending to show that the accused has committed or been convicted of an offence other than that which is under investigation. If and when such a situation arises, it is open to counsel to apply to the presiding judge that he may be allowed to take the course indicated, as was done in this case. Such an application will not always be granted, for the judge has a discretion in the matter. He may feel that, even though the position is established in law, still the putting of such questions as to the character of the accused may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused almost impossible. On the other hand, in the ordinary and normal case, he may feel that if the credit of the prosecutor or his witnesses has been attacked it is only fair that the jury should have before them material on which they can form their judgment as to whether the accused is any more worthy to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark as to an accused person's character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section. The essential thing is a fair trial, and that the legislature sought to ensure by s. 1 (f)."

In our opinion the difficulties created by s. 1, proviso (f) (ii) are, as a general rule, best dealt with in accordance with the principle in *R.* v. *Hudson* (1), as applied in *R.* v. *Jenkins* (5). The attempt to give the words a limited construction has led to decisions which it is difficult to reconcile; now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words of s. 1, proviso (f) (ii) in favour of the defence. We think, therefore, that the words should be given their natural and

(1) 76 J.P. 421; [1912] 2 K.B. 464.
(2) 119 J.P. 531; [1955] 3 All E.R. 29.
(3) 98 J.P. 387; [1934] All E.R. Rep. 168; [1935] A.C. 309.
(4) 109 J.P. 1; [1944] 2 All E.R. 13; [1944] A.C. 315.
(5) (1945), 110 J.P. 86; 114 L.J.K.B. 425.

ordinary meaning and that the trial judge should in his discretion do what is necessary in the circumstances to protect the prisoner from an application of s. 1, proviso (f) (ii) that would be too severe. It may be that, as indicated in *O'Hara* v. *H.M. Advocate* (1), cases of rape should be regarded as sui generis; certainly the peculiar questions to which they give rise have been settled by *R.* v. *Turner* (2) and that case has determined how the discretion should be exercised. No equally clear guidance can be given in cases where the subject-matter is not so specialised. In particular, no firm rule has been, or can be, laid down to govern the sort of circumstances we have to consider here where the defence involves a suggestion of impropriety against a police officer. The cases on this subject-matter—in particular, *R.* v. *Preston* (3), *R.* v. *Jones* (4), and *R.* v. *Clark* (5)—indicate the factors to be borne in mind and the sort of question that a judge should ask himself. Is a deliberate attack being made on the conduct of the police officer calculated to discredit him wholly as a witness? If there is, a judge might well feel that he must withdraw the protection which he would desire to extend as far as possible to an accused who was endeavouring only to develop a line of defence. If there is a real issue about the conduct of an important witness which the jury will inevitably have to settle in order to arrive at their verdict, then, as SINGLETON, J., put it in *R.* v. *Jenkins* (6) and LORD GODDARD, C.J., repeated in *R.* v. *Clark* (5), the jury is entitled to know the credit of the man on whose word the witness's character is being impugned.

We now apply these principles to the circumstances of this case. In our judgment, when the prosecution's evidence of an admission to a police officer is met by saying that it was extorted by means of a threat that otherwise the prisoner's wife would be charged, the defence is so conducted as to involve an imputation on the character of the police officer. The issue, therefore, becomes one of discretion. It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision; but in this case we are not satisfied that the learned judge really exercised his discretion at all. He allowed the questions to be put because he thought that counsel was strictly entitled to do so, although he, the learned chairman, queried whether it was necessary. Accordingly, it falls to us to exercise our own discretion in the matter.

Counsel for the appellant did not dispute that the conduct imputed to the police officer was grossly improper, but he submitted that it was not like a charge of fabrication or concoction which goes to the root of a witness's integrity and which, if accepted, destroys the whole of his evidence on every point in the case. He submitted also that the attack was not pointedly directed against the witness under cross-examination, but was made against the police generally. The charge was not elaborated or pressed; it was repeated several times, but that was probably because the appellant is a man who often repeats himself. Finally, counsel for the appellant made the substantial point that no warning was given to the appellant before his convictions were put to him. In cases of this sort where there is no hard and fast rule, some warning to the defence that it is

(1) 1948 S.C. (J.) 90.
(2) [1944] 1 All E.R. 599; [1944] K.B. 463.
(3) 73 J.P. 173; [1909] 1 K.B. 568.
(4) (1923), 87 J.P. 147.
(5) 119 J.P. 531; [1955] 3 All E.R. 29.
(6) (1945), 110 J.P. 86; 114 L.J.K.B. 425.

going too far is of great importance; and it has always been the practice for prosecuting counsel to indicate in advance that he is going to claim his rights under s. 1, proviso (f) (ii), or for the judge to give the defence a caution. This is especially needful when the prisoner, as here, was not represented, although it is fair to say that the appellant professed familiarity with the law and rejected the legal aid that had been assigned to him. We have come to the conclusion that the questions ought not to have been put.

It is not often in this type of case that the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, can properly be applied. But here, in our judgment, the case against the appellant is overwhelming. The evidence for the prosecution called for some reasonable explanation by him about how he came to be in possession of the cheque forms and to use one with a fictitious signature on it. The appellant's story was that a motor dealer called Todd, who had died just before the trial took place, offered him a car for £300. The appellant agreed to buy the car; he had only got £165, but proposed to collect the balance off his mates in the morning. Mr. Todd then told the appellant to collect the car from Mr. Long and for this purpose gave him the cheque signed in the name of Pratten for £430; this meant that Mr. Todd would have been losing £130 on the transaction. No one in his senses could believe a story of this sort. Apart from all its inherent improbability, it was quite inconsistent with the statements made by the appellant to Detective Constable Thomas. Finally, we may add that the learned chairman gave to the jury a proper direction about the limited effect of the appellant's bad character. Although we think that the chairman, in his discretion, should have refused to allow the appellant to be cross-examined as to his previous convictions, we are satisfied that the only reasonable and proper verdict on the facts was one of guilty and that there has been no miscarriage of justice. It is for that reason that we dismissed the appeal.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal*; *Stileman, Neate & Topping*, agents for *Fryer, Bennett & Deal*, Weston-super-Mare.

T.R.F.B.

Eng Rev

COURT OF APPEAL

(LORD EVERSHED, M.R., SELLERS AND ORMEROD, L.JJ.)

March 2, 3, 23, 1959

EASTBOURNE CORPORATION *v.* FORTES ICE CREAM PARLOUR (1955), LTD.

Town and Country Planning—Enforcement notice—Appeal against notice—Jurisdiction of justices to determine whether development has taken place—Town and Country Planning Act, 1947 (10 *and* 11 *Geo.* 6, *c.* 51), *s.* 23 (4).

The appellants, Fortes Ice Cream Parlour (1955), Ltd., placed, without planning permission, an ice cream sales machine on the forecourt of their premises. An enforcement notice served on them requiring the removal of the machine was quashed on appeal by the justices under s. 23 (4) of the Town and Country Planning Act, 1947, on the ground that there was no development within the meaning of s. 12 of the Act of 1947. On appeal that decision was reversed by the Divisional Court on the ground that the justices had no power to inquire or determine whether there was a development. On appeal to the Court of Appeal,

HELD: the magistrates' court had jurisdiction to determine whether the matters referred to in the enforcement notice as being development did or did not constitute development.

Keats v. *London County Council* (1954), 118 J.P. 548, overruled.

Decision of Divisional Court, (1958), 122 J.P. 324, reversed.

APPEAL by Fortes Ice Cream Parlour (1955), Ltd., from a decision of the Queen's Bench Divisional Court, reported 122 J.P. 324, whereby a decision of the justices for the county borough of Eastbourne quashing an enforcement notice was reversed.

Pennycuick, Q.C., and *J. D. James* for the appellants.

Geoffrey Lawrence, Q.C., and *Boydell* for the respondents, Eastbourne Corporation.

Cur. adv. vult.

Mar. 23. The following judgments were read.

LORD EVERSHED, M.R.: The appellants, Fortes Ice Cream Parlour (1955), Ltd., at all material times have occupied at Eastbourne premises which they have used as an ice cream parlour. In June, 1956, the appellants placed on the forecourt outside the premises an automatic coin-operated ice cream sales machine, bolted to the ground when in use and supplied with refrigeration by means of electric cables from the shop. The appellants did not ask for or obtain planning permission from the respondents, the Eastbourne Corporation, who, in May, 1957, served on the appellants an enforcement notice requiring removal of the machine. The appellants appealed to the justices under the Town and Country Planning Act, 1947, s. 23 (4); and the justices quashed the notice, on the ground that no "development", within the meaning of s. 12 of the Act, had occurred. On appeal, by way of Case Stated, by the Eastbourne Corporation to the Divisional Court of the Queen's Bench Division, that court held (by a majority; LORD GODDARD, C.J., dissenting) that the justices had no power under the Town and Country Planning Act, 1947, to inquire or determine whether in fact development had taken place. From that decision, Fortes Ice Cream Parlour (1955), Ltd., now appeal to this court.

I adopt as a statement of the problems raised by the appeal the language of LORD GODDARD, C.J.:

"The question which we have to determine depends, in my opinion, on the construction of the words 'if satisfied that permission was granted under

this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof.' Are the court to assume that there has been development and must they confine themselves to considering whether it is development permitted by the Act without permission, or can they go further and decide that there has not, in fact, been any development? I propose in the first place to treat this as a matter of construction, and then to consider what effect, if any, the cases which have been decided on the section have on the conclusion to which I have come."

I propose accordingly for my part also to deal with the problems raised as he did and as, indeed, they were presented to us by counsel for the appellants and respondents: namely, first to consider the matter of construction of the Act, and second, the effect of the cases, and particularly of *East Riding County Council* v. *Park Estate* (*Bridlington*), *Ltd.* (1) in the House of Lords.

First, then, as to the construction of the Act. The vital words in s. 23 (4) are those cited by LORD GODDARD, C.J.—" or that no such permission was required in respect thereof ". Section 12 (1) enacts that

". . . permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day."

The appointed day was July 1, 1948. Sub-section (2) provides:

" In this Act, except where the context otherwise requires, the expression ' development ' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land: Provided that the following operations or uses of land shall not be deemed for the purposes of this Act to involve development of the land, that is to say . . .":

and then there are under paras. (a) to (f) inclusive a number of such cases not deemed (accordingly) to involve development. Sub-section (3) provides: " For the avoidance of doubt it is hereby declared that for the purposes of this section . . ." and then there are two paragraphs showing matters which, for avoidance of doubt, are to be treated as affirmatively involving development (e.g., " the use as two or more separate dwelling-houses of any building previously used as a single dwelling-house "); and there is a proviso which I need not read. Sub-section (5) is as follows:

" Notwithstanding anything in this section, permission shall not be required under this Part of this Act . . .":

and then there follow in three paragraphs, (a), (b) and (c), cases in which permission is not required for what is assumed none the less to be development. Again there are provisos to which I need not allude.

Counsel for the corporation observed that three conceptions are involved in s. 12, viz.: (i) that of " development of land ", which is closely defined in the section; (ii) that of changes of user which are deemed not to constitute development; and (iii) that of changes of user which, though constituting development, are excused from requiring permission. Counsel drew attention to the distinction between the second and third conceptions. Parliament might, as he pointed out, have treated those changes in user falling within the second conception in the same way as those falling within the third, viz., that they were excused from the requirement of permission. An answer to his point in this respect may be that, by so doing, Parliament would or might have thereby widened the meaning of the word " development ". But the distinction is made and was somewhat relied on, as later appears, by counsel in support of his argument for the corporation.

(1) 120 J.P. 380; [1956] 2 All E.R. 669; [1957] A.C. 223.

I turn to s. 23. It provides:

"(1) If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section.

"(2) Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition . . .

"(4) If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may . . . appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates; (b) if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring the land . . . shall vary the notice accordingly; (c) in any other case shall dismiss the appeal."

As I have already stated, the relevant words in the last sub-section that I have read, sub-s. (4), are "that no such permission was required in respect thereof".

It was conceded by counsel for the corporation that if his arguments were to prevail the clear meaning of these words *must* exclude the relevant inquiry, viz., whether the use alleged or complained of constituted development at all. The concession was, in my judgment, necessary; for if on this matter the construction and scope of the words be doubtful, then counsel for the corporation would be inevitably faced with the serious difficulty presented to his argument by inconsistency created by other provisions in the Act and most forcibly by the terms of s. 17.

Counsel for the corporation's first submission was based on the strict limitation on the powers of justices which appears from the language of s. 23 (4) itself, and particularly the words in para. (c) "in any other case shall dismiss the appeal". The limitation is indeed plain and has been noted in the cases, including the *East Riding* case (1) itself. With this background of strict limitation of powers, counsel then proceeded to emphasise the word "such" immediately before the word "permission" in the relevant formula. He contended—and in my judgment rightly contended—that the word "such" was a reference back to s. 12, so that the phrase, when extended, reads "no permission under this Part of this Act was required"—etc. With this interpretation

(1) 120 J.P. 380; [1956] 2 All E.R. 660; [1957] A.C. 223.

of the word " such " Mr. Megarry (who argued this point in *Guildford Rural District Council* v. *Penny* (1) (post, p. 286) our judgment in which follows after this case) was himself in agreement. It follows, according to counsel for the corporation, that if one refers back to s. 12, then permission is only found to be required for what must be, or must be assumed to be, post-1948 development. Thus, although in this matter counsel may be said to have protected his argument in advance from the effect of the *East Riding* case (2), it may be open to the justices to inquire whether the " development " was carried out before or after the appointed day. But that, according to counsel's argument, is all that the justices may investigate as regards the existence of the development. In other words, subject to this one question of date, the justices' only function, according to the proper meaning of the language used in the relevant formula, is to inquire whether the development mentioned in the notice is or is not of the " excused " class. Thus will be observed the significance of the distinction emphasised by counsel between the second and third conceptions above mentioned, i.e., the conception of user not deemed to be development and user which, though constituting development, is excused from the requirement of permission.

Counsel for the corporation sought further support for his contention from the opening formula in s. 23 (1), " if it appears to the local planning authority . . . ", a formula which he claimed to be hallowed by authority as indicating the intention by Parliament that that which so appeared in good faith was unchallengeable in the courts; and he cited by way of illustration the judgments of LAWRENCE, J., and CHANNELL, J., in *Robinson* v. *Sunderland Corpn.* (3) and of this court in *Point of Ayr Collieries, Ltd.* v. *Lloyd-George* (4). Finally, counsel drew attention to the contrast between the limited scope of the justices' powers as it appears from the terms of s. 23 (4) of the Act of 1947 and the generality of the corresponding powers of the older legislation: see the Town and Country Planning Act, 1932, s. 13 (4), and the Town and Country Planning (Interim Development) Act, 1943, s. 5 (2), and sched. 1. The contrast, said he, emphasised that in the later legislation Parliament deliberately circumscribed the powers vested in the magistrates' courts of interference with the planning authorities.

There is plainly great force in these arguments. It is, in my judgment, undeniable that on a first reading of the relevant words in s. 23 (4) the draftsman appears to be directing himself to the question whether the (assumed) development is of a kind for which no permission is required—the conception of " excused development ". I do not, therefore, doubt that the words may fairly, and perhaps more naturally, be construed in this narrow sense. But I have for my part reached a clear conclusion that it is not the necessary and inevitable meaning of the words. I will first dispose briefly of the two general contentions on the corporation's part last mentioned. There is no doubt that in certain contexts and for certain purposes the words " if it appears " and similar formulae are intended to exclude challenge where the opinion formed has been arrived at in good faith. But, as counsel for the appellants pointed out, in these cases the purpose and effect of the formation of such an opinion was not itself to determine private rights but was the condition precedent for the exercise of some statutory power. Thus, in the *Point of Ayr* case (4) the formation by the Minister of Fuel and Power of the opinion that the interests of public safety or the efficient prosecution of the war or like considerations required it, gave rise to a power on

(1) Post, p. 286.
(2) 120 J.P. 380; [1956] 2 All E.R. 669; [1957] A.C. 223.
(3) 63 J.P. 341; [1899] 1 Q.B. 751.
(4) [1943] 2 All E.R. 546.

his part to take the necessary steps to assume control of a colliery undertaking. Such considerations have no application to the present case, where the relevant question is whether unauthorised development of land has taken place—a question admittedly liable to challenge at some stage, under s. 24, if not under s. 23. In such a case there would appear to be no natural ground of logic or precedent for giving to three simple English words the effect of prejudging one of the essential matters of fact on which the justification of the owner's actions will depend. I am also unable to think that the difference in the relevant terminology between the old and the new legislation can really assist in the problem of construction. And I note that, notwithstanding the change in form, the scheme of the older legislation does not differ from that of the new in this, that where the planning authority seek actually to enforce their previous notice, then the owner will not be entitled to rely by way of defence on points that he might have earlier taken by way of appeal to the justices (see s. 13 (6) of the Act of 1932).

I return to the vital language of s. 23 (4) of the Act of 1947, and, in my judgment, much assistance towards a proper solution is to be found in the last seven words "... the development to which the notice relates". For properly expounded by reference to the earlier sub-s. (1) and sub-s. (2), these words must, in my view, mean (and I am again indebted to Mr. Megarry in the *Guildford* case (1)) "the development which is alleged to have been carried out without the grant of permission required in that behalf under this Part of the Act". In my judgment, it is the use of the word "alleged" derived from sub-s. (2) that provides the all-important clue. It is, as I think, an essential requirement of the enforcement notice that it should *allege* development carried out without permission; and I can see no compelling reason for holding that the only subject of the "allegation" is the absence of permission, the development itself (that is, the requirement) being assumed. On the contrary, it appears to me more natural to treat the allegation as being, as it were, a double allegation—an allegation both of the development (requiring permission) having been carried out and of the absence of permission; and, if so, that the justices' powers conferred by the formula in question involve inquiry whether no permission under Part 3 of the Act was required on the ground that there had been in fact no development either after 1948 or at all, no less than on the ground that, though post-1948 development had occurred, it was of a kind that did not require permission.

If, then, this is a fair and legitimate view of the construction of the subsection, there are (as I have earlier indicated) strong grounds of consistency in the Act as a whole, and of convenience, for its adoption. I refer first to s. 75, which makes applicable, subject to the provisions of the section, the enforcement procedure of s. 23 to contraventions of pre-1948 planning control. But in such cases there is substituted for the terms of para. (a) of s. 23 (4) the para. (a) set out in s. 75 (5), viz.:

> "if satisfied that the works or use to which the notice relates are not works or a use to which s. 75 of this Act applies, shall quash the notice to which the appeal relates."

In my judgment it is impossible, according to the ordinary sense of this paragraph, to deny to the justices the power of determining whether in fact the use complained of occurred before 1948 or at all; and if this is right there would, according to the corporation's argument, be an incongruity between the justices' powers in the cases of alleged pre-1948 and post-1948 development.

(1) Post, p. 286.

More cogent still, however, are the terms of s. 17. This section relates to "Applications to determine whether permission [is] required ". By that section it is provided:

> " (1) If any person who proposes to carry out any operations on land or make any change in the use of land wishes to have it determined whether the carrying out of those operations or the making of that change in the use of the land, would constitute or involve development . . . and, if so, whether an application for permission . . . is required . . . having regard to the . . . development order, he may . . . apply to the local planning authority to determine that question.
>
> " (2) The foregoing provisions of this Part of this Act shall, subject to any necessary modifications, apply in relation to any application under this section and to the determination thereof as they apply in relation to applications for permission to develop land and to the determination of such applications: Provided that where it is decided by the Minister under any of the said provisions that any operations or use . . . would constitute . . . development . . . or that an application for permission is required . . . that decision shall not be final for the purposes of any appeal to the court under the provisions of this Part of this Act relating to the enforcement of planning control, in relation to those operations or that use."

It is clear, and was conceded by counsel for the corporation, that the terms of the proviso to sub-s. (2), which clearly assume the power which the corporation deny, cannot be reconciled with s. 23 (4) if the corporation's contention is well-founded. Faced with this repugnancy, counsel for the corporation would reject the proviso to s. 17 (2) altogether—for no middle course is possible. This was indeed the conclusion of the majority of the Divisional Court, but I am unable to accept the necessity. It is no doubt true, as DONOVAN, J., said, that if two sections of an Act of Parliament are in truth irreconcilable, then prima facie the later will be preferred: and that the courts will tend against inferring an independent substantive enactment from a mere proviso to another enactment. But these are arguments of the last resort. The first duty of the court must be, if the result is fairly possible, to give effect to the whole expression of the parliamentary intention. In the present case, for reasons already given, I do not think the repugnancy, on a true analysis, arises.

On the matter of convenience, perhaps I may be allowed, in anticipation of what follows, to cite from my own speech in the *East Riding* case (1). I said:

> " But other cases may well arise in which serious questions of fact might be involved, questions whether, in truth, the development had been carried out before the appointed day, or whether the land had, in fact, ever been used as alleged. If in such cases it were beyond the jurisdiction of the justices on an appeal to determine such questions of fact, then the only course open to the owner would be to await the taking of further steps by the authority under s. 24 of the Act, and then to challenge the validity of the notice; a course which might well involve him in a long period of uncertainty, and would certainly be likely to expose him to serious expense. Equally might such a course of proceedings be an embarrassment to the authority who might find, when the facts had turned out ultimately against them, that it was then too late to exercise their statutory powers and duties at all."

I therefore, on the question of construction, reach the same conclusion as LORD GODDARD, C.J., and I am unable, with all respect to them, to agree with the

(1) 120 J.P. 380; [1956] 2 All E.R. 669; [1957] A.C. 223.

view of the majority of the court as expressed by DONOVAN, J. DONOVAN, J., said:

> "... I think that it is inaccurate to speak of permission not being required under the Act on the ground that the particular operation or change of use is not 'development'. For then, as I say, the question does not arise at all. The phrase is apt only to refer to that which is development but which the Act exempts from the necessity for permission."

It is at this point that I have to part company with the learned judge; for in saying that, in the circumstances he supposed, "the question does not arise at all", he might, as it seems to me, be said to be begging the question which has to be decided. I add in conclusion on this part of the case that (particularly having regard to s. 17) I can see no sufficient ground for supposing that the competence of the justices to inquire, aye or no, into the fact of development should be regarded as a subject-matter inappropriate for their jurisdiction. Rather, and as a matter of principle, I should prefer the view that clear words must be found to justify an ousting, on such a matter, of the jurisdiction of the courts.

I turn now to the second question posed at the beginning of this judgment, viz., what effect, if any, the decided cases, and particularly the *East Riding* case (1), have had on the question. In the *East Riding* case (1), the questions before the House of Lords included the questions whether the enforcement notice there in suit ought to be taken as alleging a post-1948 development and, if so, whether the justices had power to quash it, the alleged development being admitted or found to have been pre-1948. These questions were answered affirmatively by the majority of the House. It will, however, be observed that the second of these two questions was not the precise question now before us. The problem in the *East Riding* case (1), so far as it concerned development, was confined to date—a problem which counsel for the corporation might be regarded as open to inquiry by the justices, having regard to the reference to the appointed day in s. 12 (1) of the Act. The problem whether it is competent for the justices to investigate the question whether what has been done amounts to development at all within the meaning of the Act was not expressly decided, and indeed may be said to have been deliberately left undecided by the last paragraph of my own speech. Nevertheless, I agree with LORD GODDARD, C.J., that the reasoning which underlay the decision of the majority of the House applies to, and covers, the present question. VISCOUNT SIMONDS, in his leading speech, said:

> "I do not dissent from the conclusion to which the Divisional Court came, and I think that, in the earlier part of the passage that I have cited, the view is clearly expressed that, on its true construction, the notice purported to refer to development for which permission under the Act of 1947 was required, whereas, in fact, such permission was not required. That, not the lack of clear indication, gave jurisdiction to quash."

LORD COHEN similarly stated his conclusion in general terms:

> "It was proved before the magistrates that the development took place before the appointed day, and it was agreed that no obligation rested on the respondents to obtain permission under the law in force before the appointed day. It seems to me that, in these circumstances, the respondents proved that no such permission was required in respect thereof, i.e., in respect of 'the development to which the notice relates'. The magistrates,

(1) 120 J.P. 380; [1956] 2 All E.R. 669; [1957] A.C. 223.

therefore, had jurisdiction to quash the enforcement order, and, in my opinion, they should have done so."

The matter is dealt with perhaps more fully in my own speech; and I have already referred to the concluding paragraph, where I said:

> "The words in s. 23 (4), 'no such permission was required in respect thereof', are clearly capable of application to any case in which permission was not, in truth, required under the Act of 1947, whether because the development was of a kind which, by the terms of the Act, called for no permission, or because the development, by reason of the date when it was carried out, was outside the scope of the Act altogether. In the absence, therefore, of any provision for the case of a notice related to development alleged to have been carried out after July 1, 1948, but executed, in fact, prior to that date, and having regard to the incongruity which would otherwise appear to arise in the converse case of a notice related to development alleged to have been carried out before but, in fact, executed after the appointed day, I think the Court of Appeal and the Divisional Court were right in holding that, in the circumstances and on its true construction, the enforcement notice of Apr. 26, 1951, ought to have been quashed by the justices."

Although in this passage I do not refer to the problem which has arisen in this case, I venture to think that, in the light of the earlier argument in the speech, my conclusion must be taken to have been in favour of a construction of the relevant words rendering them applicable to any case in which permission was not, for any reason, required under the Act of 1947. Put in other words, I think that if we were to distinguish the present case from that directly covered by the *East Riding* case (1), we would introduce an extremely narrow and unjustifiable refinement in the construction of the section.

Agreeing, then, as I do, with the judgment of LORD GODDARD, C.J., I agree also with him that *Keats* v. *London County Council* (2) must be taken to have been wrongly decided, and that the opinion to that effect expressed by the Divisional Court in *Norris* v. *Edmonton Corpn.* (3) was correct.

We were referred to a number of other cases by Mr. Megarry in the *Guildford* case (4) and by counsel for the appellants in the present case. In none of these other cases was the point raised which calls for determination in the present case. I do not, therefore, find it necessary to refer further to them save to say that there is nothing in any of the judgments in those cases which is in conflict with the view that I have formed. This court, like the Divisional Court, has been much assisted by the full arguments of counsel for the appellants and counsel for the corporation, and also by the argument in the *Guildford* case (4) of Mr. Megarry which counsel for the appellants adopted, and I wish to acknowledge my indebtedness to counsel accordingly. Counsel for the corporation informed us that the particular concern of the Eastbourne Corporation (and other local planning authorities) was to obtain from the court a decision which would assist them in the performance of their duties under the Act. For this reason I have thought it desirable to deal somewhat fully with the arguments put before us. But in the end I have reached a clear conclusion that the appellants' contention should prevail. I think, therefore, that the appeal should be allowed. Since no other matter is raised in the appeal, the result will be that the question raised by the Case Stated will be answered in the affirmative and

(1) 120 J.P. 380; [1956] 2 All E.R. 669; [1957] A.C. 223.
(2) 118 J.P. 548; [1954] 3 All E.R. 303.
(3) 121 J.P. 513; [1957] 2 All E.R. 801; [1957] 2 Q.B. 564.
(4) Post, p. 286.

that the justices were entitled to quash the enforcement notice. I am authorised by **ORMEROD, L.J.**, to say that he agrees with the judgment which I have just delivered.

SELLERS, L.J.: On the construction of the words

> " if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof "

I would go the whole way with the reasoning and conclusion of LORD GODDARD, C.J., in his dissenting judgment. No permission is required unless there has been development and on their face the words " or that no such permission was required in respect thereof " would permit, as I read them, of a contention that no permission was required because there had been no development. If it is to be conceded that s. 23 of the Town and Country Planning Act, 1947, construed narrowly by itself can be made to work and can so provide a more limited jurisdiction to the justices, this construction admittedly would put the section out of harmony with the Act as a whole as it involves ignoring the proviso to s. 17 (2).

The interpretation which the appellants advance and which my Lord has stated and developed in detail relies on and accepts in full the proviso and leaves no repugnancy or inconsistency or, as DONOVAN, J., puts it, no " real difficulty ". Further, DONOVAN, J., says:

> " If local benches of justices . . . can override the planning authority on the question whether something is ' development ' or not, it is obvious that they can interfere with all development plans, and that a large measure of planning control (as distinct from enforcement) has been placed in their hands. Had this been Parliament's intention, I cannot believe that it would have been effected by a mere proviso in a section dealing with a different subject-matter."

The force of this comment seems to be minimised when it is seen that if the penal powers under s. 24 of the Act were to be invoked the justices would admittedly have power to consider whether development had taken place or not and so, if thought fit, to " override " the planning authority. Unguided by my Lord here and perhaps more compellingly by his speech in *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.* (1) in the House of Lords, I should not have felt any certainty or probability that by the words " or that no such permission was required in respect thereof " the draftsman was intending to direct himself solely to the question whether the (assumed) development is of a kind for which no permission is required, but with that unimportant reservation, if unfettered, I agree entirely with the judgment delivered by my Lord and would allow the appeal accordingly.

Appeal allowed.

Solicitors: *Clifford-Turner & Co., Sharpe, Pritchard & Co.*, agents for *Town clerk*, Eastbourne.

F.G.

(1) 120 J.P. 380; [1956] 2 All E.R. 669; [1957] A.C. 223.

COURT OF APPEAL

(LORD EVERSHED, M.R., SELLERS AND ORMEROD, L.JJ.)

February 25, 26, 27, March 2, 23, 1959

GUILDFORD RURAL DISTRICT COUNCIL *v.* PENNY AND ANOTHER

Town and Country Planning—Development—Caravan site—Increase of number of caravans—Town and Country Planning Act, 1947 (10 *and* 11 *Geo.* 6, *c.* 51), *s.* 12 (2).

Before July 1, 1948, an acre and a half of land was used as a caravan site for not more than eight caravans at a time. On June 18, 1956, the Minister of Housing and Local Government allowed the use of the site for twenty-one caravans. Later, the owners increased the number to twenty-eight, and the local authority served an enforcement notice on them to discontinue the use in excess of twenty-one. On complaint by the owners the justices quashed the notice on the ground that the increase in number did not constitute a material change of use of the land. On appeal by the local authority, the Divisional Court reversed the decision on the ground that the justices had no power to inquire whether there was a development. On appeal to the Court of Appeal,

HELD: (applying *Eastbourne Corporation* v. *Fortes Ice Cream Parlour* (1955) *Ltd.*, ante p. 277) the question whether the increase in number amounted to a development was one of fact for the justices to decide and the courts could not interfere.

APPEAL by Jack Spence Penny and Doris Elsie Penny from a decision of the Divisional Court, dated May 22, 1958, reversing the order of the Woking justices dated Oct. 29, 1957, whereby an enforcement notice served on Aug. 21, 1957, on the appellants by the Guildford Rural District Council, (acting as local planning authority), was quashed under the Town and Country Planning Act, 1947, s. 23 (4). The following facts (among others) were found by the justices. The land to which the enforcement notice related was about 1½ acres in extent. From about 1934 until March, 1955, the land was used as a health and holiday camp which involved: (i) the construction of chalets on the land for use as holiday homes, none of which now remained in existence; (ii) the use of the land for camping in tents; (iii) the use of the land as a site for caravans. The number of caravans stationed on the land at any one time between 1935 and 1955 was never less than three or more than eight. In June, 1955, the number of caravans on the land, all used as permanent residences, had increased to fifteen. The appellants applied for permission under s. 14 of the Act to continue use of the land as a site for residential caravans up to the maximum number of thirty-five. The application was refused. The appellants appealed to the Minister under s. 16 of the Act. In April, 1956, a public inquiry into that appeal was held. The number of residential caravans had by then increased to twenty-one. On June 18, 1956, the Minister allowed the appeal to the extent that he permitted the use of the land for the stationing of not more than twenty-one caravans. At the date of the service of the enforcement notice the number of caravans on the land was twenty-six, and at the date of the hearing before the justices twenty-seven. On Dec. 15, 1955, the planning authority granted to the appellants a licence under s. 269 of the Public Health Act, 1936, authorising the use of the land as a site for caravans not exceeding thirty. It was contended by the planning authority: (a) that the increase in the number of residential caravans on the land which occurred between July 1, 1948, and the grant of permission by the Minister constituted a material change in the use of the land, and accordingly that there had been a development for which permission was required under s. 12 of the Act; (b) that the permission given by the Minister was a necessary permission granted with retrospective effect in the exercise of

the powers under s. 18 of the Act which validly limited the number of caravans permitted to be stationed on the land to twenty-one; (c) that the further increase in the number of caravans bringing the total in excess of twenty-one was a development of the land carried out without permission under the Act. It was contended by the appellants: (a) that the use of the land as a whole on July 1, 1948, was as a camping and caravan site and that the increase in the number of caravans on the land which had occurred thereafter did not amount to a material change of the user; (b) that the appellants did not require the permission for which they applied in 1955 and the permission which the Minister purported to grant was of no effect; (c) that there was no limit to the number of caravans which could lawfully be stationed on the land save that contained in the licence granted under the Public Health Act, 1936. The justices were of the opinion that the increase in the number of caravans from eight to twenty-seven did not in the circumstances constitute a material change of use of the land and accordingly quashed the enforcement notice. On appeal by Case Stated to the Divisional Court the determination of the justices was reversed and the appellants now appealed.

Megarry, Q.C., and *Marder* for the appellants.

N. C. Bridge for the district council.

Cur. adv. vult.

Mar. 23. The following judgments were read.

LORD EVERSHED, M.R.: This appeal raises two questions, namely—first, whether the justices at Woking had jurisdiction under the Town and Country Planning Act, 1947, to inquire into and determine whether there had in fact been development on the land owned and occupied by the appellants, within the meaning of s. 12 of the Act; and second, if so, whether they were entitled to conclude, as they did, that there had not been any development.

The facts appear from the Case Stated and may be briefly summarised as follows. The appellants, Mr. and Mrs. Penny, are the proprietors of 1½ acres of land within the jurisdiction of the respondents, the Guildford Rural District Council, as the appropriate local planning authority. On July 1, 1948—the date of the coming into operation of the Town and Country Planning Act, 1947—the land was being used (as it had been before that date and as it has continued to be used since) as a site for residential caravans. On July 1, 1948, the number of such caravans appears to have been eight, but thereafter the number steadily increased. In 1955 and 1956 recourse was had to the powers and jurisdiction of the local planning authority and (on appeal) to the Minister, the result of which was that the Minister permitted twenty-one caravans to be placed on the land. The appellants, however, were not satisfied with the scope allowed by this determination on the part of the Minister; and it is not now in doubt that, in spite of the time and the trouble taken, we must determine the question before us without regard to what was then done.

When the matter came before the justices, the number of caravans on the site was twenty-seven and the justices were of opinion that the increase in the number of caravans from eight to twenty-seven did not, in the circumstances, constitute a material change of use of the land and they accordingly quashed the council's enforcement notice dated Aug. 21, 1957. The matter having then been taken, by way of Case Stated, to the Divisional Court, the present appellants conceded before that court that its recent decision in *Eastbourne Corpn.* v. *Fortes Ice Cream Parlour (1955), Ltd.* (1) must cover this case also, and they submitted accordingly to an order allowing the council's appeal and setting aside

(1) Ante, p. 277.

the justices' order. From that order by the Divisional Court the matter has now come on appeal before this court.

On the first question, that of the jurisdiction of the justices, we have had the advantage of a full and careful argument by counsel for the appellants. Counsel for the local authority did not desire to contest that point; and in any event the judgments which we have now delivered in the *Eastbourne* case (1) have determined that point in the present case in the appellants' favour. There remains, however, the second question: Were the justices justified in concluding, as they did, that the increase from eight to twenty-seven in the number of caravans on this site did not amount to a material change in the user of the land? If it is open to the justices to decide the question aye or no, then according to the appellants it is a question of fact and degree, with which this court cannot interfere.

It was said by counsel for the appellants that on July 1, 1948, the land was a caravan site and that its use as such has not changed materially or otherwise by the mere fact of adding to the number of caravans; and so the justices must be taken to have held. At one time during the argument the question was raised by the court whether the placing—or, to use the word sometimes used, the stationing—of caravans on the land might constitute "other operations on land" within the formula in s. 12 (2) which reads (so far as relevant) "In this Act . . . 'development' means the carrying out of building, engineering, mining or other operations . . . on . . . land . . .". This point was not one taken or indeed put to us at all by counsel for the local authority; and on reflection I have no difficulty in rejecting it. After all, these caravans (as I understand) remain, and remain always, mobile on their wheels and never become so attached to the land that they could fairly be regarded as equivalent to dwelling-houses of some kind.

Counsel for the appellants contended that the mere intensity of user or occupation could never be relevant. As a general proposition, I am not prepared to accept that argument; nor indeed is it necessary to do so. Mere intensity of user may (as it seems to me; but I must not be taken as deciding this point) affect a definable character of the land and of its use—or one of them. An example was taken during the argument of some housing estate, or part of a housing estate, on which houses had been erected of a certain density per acre. If the density of the houses on that part of the estate is greatly increased, it seems to me that it may—I say no more—affect the material nature or character of the housing estate as such, or that part of it, and, therefore, of the user of that part of the land. I refer also to another example taken during the argument—that of a cricket ground. If the Kennington Oval Cricket Ground were used so as to provide continuously a great number of pitches, on which boys or others could contemporaneously play cricket during the summer, no doubt the Kennington Oval would remain a cricket ground but it would be a cricket ground materially changed: it would no longer be a first-class county cricket ground, but would be a cricket ground of a different kind. It is also, as it seems to me, obvious that increasing intensity of use or occupation may involve a substantial increase in the burden of the services which a local authority has to supply, and that in truth might, in some cases at least, be material in considering whether the use of the land had been materially changed.

These are questions all of which would depend on the particular circumstances of the particular cases in which they arose for decision. They do not arise here; and I, therefore, express no view about them, leaving it rather open for future

(1) Ante, p. 277.

consideration when the occasion (if ever) arises. But, as I have earlier indicated, I am not able to accept, and find it unnecessary to accept, the wide and general proposition which counsel for the appellants put forward.

None the less all these matters—including the illustrations which I have given—are, primarily at any rate, questions of fact for the justices; and in this case there seemed to be no such points taken of the nature of the examples which I have given. So much I gather from the Case itself. But a reference to the Case does show this—and it is a matter which caused me some concern. The Case states, in very brief form, the relevant facts as found. The first paragraph is merely the date and fact of the enforcement notice. The second is:

> "The land to which the said enforcement notice relates (hereinafter called 'the land') is about 1½ acres in extent. From about 1934 until March, 1955, the land was used as a health and holiday camp. The said use involved: (i) the construction of chalets on the land for use as holiday homes, none of which now remains in existence [though, I interpolate, the date of their final disappearance is unstated.] (ii) the use of the land for camping in tents; (iii) the use of the land as a site for caravans . . ."

Then the Case goes on to deal with the number of caravans. It seems to me that a health and holiday camp may well be something sensibly or materially different from a caravan site; and indeed so much appears from the language of the Case itself, which states that of the three uses which the health and holiday camp involved only the third was that of a caravan site. Many activities might be associated with a health and holiday camp which would not be the same as its use for caravans. Notwithstanding that statement in the Case, it has never, as I understand, in the argument either in this court or before the justices, been contended that this 1½ acres of land was used for any purpose save that of a caravan site or that it was, save in that sense, a health and holiday camp.

It therefore comes back to this, as the question has been put and argued here and before the justices: assuming that these 1½ acres of land were from first to last used as a caravan site, did the increase from eight caravans to twenty-seven caravans, in the circumstances as found, constitute or amount to a material change? I can find no problem of law involved in the posing of that question. The justices who heard the arguments and found the facts answered the question in the negative; and in all the circumstances I conclude (as counsel for the appellants contended) that it is not open to this court to interfere with that finding of facts. I, therefore, would allow the appeal on both points.

SELLERS, L.J.: I agree with my Lord that the decision of fact in this case whether or not there has been development lies within the province of the justices and that it cannot be said that they erred in law in their finding. I too, like my Lord, would not wish to be taken, however, as supporting a view that no increase or intensification of user could in any circumstances amount to a change of user. To consider the concept broadly I would take an illustration from the sea rather than one which might arise under the Town and Country Planning legislation. If a roadstead within the control of a harbour authority were restricted to the use at one time by only two vessels of not less than two thousand tons and then it became open to all vessels irrespective of tonnage or the number at anchor, then although it remained a roadstead by its situation and nature and could be so described the change in its user might fundamentally change its character as an anchorage and might by its changed user make it that vessels of two thousand tons or over could no longer safely use it by reason of the presence of other craft. A change of this sort would appear to be a

material change and might affect the whole planning arrangement for vessels using a port. I have not sought to visualise circumstances which might arise on land.

I agree with my Lord that this appeal should be allowed on both points.

LORD EVERSHED, M.R.: I am also authorised by **ORMEROD, L.J.,** to say that he also agrees with the conclusions of SELLERS, L.J., and myself.

Appeal allowed.

Solicitors: *Garber, Vowles & Co.*; *Jaques & Co.*, for *Barlow, Norris & Jenkins*, Guildford.

F.G.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., STREATFEILD AND HINCHCLIFFE, JJ.)

March 23, 1959

R. *v.* OAKES

Criminal Law—Official secrets—Act preparatory to commission of an offence under Acts of 1911 *and* 1920—*Interpretation of section of statute—Substitution of "or" for "and"—Construction less favourable to accused—Doing of preparatory act an offence in itself—Official Secrets Act*, 1920 (10 *and* 11 *Geo.* 5, *c.* 75), *s.* 7.

By the Official Secrets Act, 1920, s. 7: "Any person who attempts to commit any offence under the principal Act [the Official Secrets Act, 1911] or this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets *and* does any act preparatory to the commission of an offence under the principal Act or this Act, shall be guilty" of an offence.

In order to give intelligible meaning to the section, the word "or" must be read in place of the word "and" where italicised. Accordingly, a count in an indictment charging the prisoner that he "did an act preparatory to communicating to another person for a purpose prejudicial to the safety of the State documents calculated to be of use to an enemy by entering into an arrangement with one W. whereby the said W. was to secure a purchaser of certain documents used in a prohibited place and in the possession of" the prisoner, charges an offence known to the law and is a valid count, since the doing of an act preparatory to the commission of an offence under the Act of 1920 or the Act of 1911 is an offence in itself.

APPEAL against conviction.

The appellant was indicted at Surrey Assizes before SLADE, J., on Nov. 20, 1958, on an indictment containing four counts. On the first count the prosecution offered no evidence. To the second count which charged him with retaining documents, contrary to s. 2 (b) of the Official Secrets Act, 1911, and to the third count, which charged him with communicating a document, contrary to s. 2 (a) of the Act, the appellant pleaded Guilty. The fourth count of the indictment charged the appellant that on July 4, 1958, in the county of Surrey, he did an act preparatory to communicating to another person for a purpose prejudicial to the safety or interests of the State documents calculated to be of use to an enemy by entering into an arrangement with one Warner whereby the said Warner was to secure a purchaser of certain documents used

in a prohibited place and in the possession of the appellant. Before the appellant pleaded to that count, defending counsel moved to quash the count on the ground that it disclosed no offence known to the law. SLADE, J., after hearing arguments, overruled the submission, whereon the appellant pleaded Guilty to that count also. The appellant was sentenced to concurrent terms of eighteen months', twelve months' and two years' imprisonment. SLADE, J., gave a certificate under s. 3 (6) of the Criminal Appeal Act, 1907, on the question whether the count disclosed an offence known to the law.

Howard, Q.C., and *Abdela* for the appellant.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Harold Brown, Q.C., and *E. J. P. Cussen* for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: This appellant was charged at Kingston-on-Thames Assizes on four counts. In regard to the first count, which was stealing official documents, no evidence was tendered and he was acquitted. To the second and third, which consisted of retaining documents contrary to s. 2 of the Official Secrets Act, 1911, and communicating a document contrary to that Act, he pleaded guilty. The fourth count was in these terms:

> "That on July 4, 1958, in this county, you did an act preparatory to communicating to another person for a purpose prejudicial to the safety or interests of the State documents calculated to be of use to an enemy by entering into an arrangement with one Warner whereby the said Warner was to secure a purchaser for certain documents used in a prohibited place and in the possession of you, the said Oakes."

Before the appellant pleaded to that count, counsel for the appellant moved to quash the count on the ground that it disclosed no offence known to the law. The learned judge, SLADE, J., after hearing arguments, overruled that submission, whereupon the appellant pleaded guilty, and it is in regard to that motion to quash the indictment that this appeal is made.

The section in question is s. 7 of the Official Secrets Act, 1920, which provides:

> "Any person who attempts to commit any offence under the principal Act or this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets and does any act preparatory to the commission of an offence under the principal Act or this Act, shall be guilty of a felony or a misdemeanour or a summary offence according as the offence in question is a felony, a misdemeanour or a summary offence, and on conviction shall be liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence."

It is pointed out, as it was pointed out to the learned judge, that several matters are there set out each of which will constitute an offence. Each is separated by the disjunctive "or" until one gets to the word "abets", when, instead of the sentence going on "or does any act preparatory to the commission of an offence", the words are "and does any act . . .". Accordingly it is said that under that section, on its literal meaning, the doing of an act preparatory to the commission of an offence is not constituted an offence of itself alone, and, as it was that with which the appellant was charged, no offence under the section was alleged.

The argument here is in a very short compass. Counsel for the appellant points out, what is undoubtedly true, that the concern of the courts is to ascertain the intention of Parliament. That intention, certainly in the first instance at any rate, is to be found from the actual words used, and he quotes in support

of that some very strong observations of LORD SIMONDS in *Magor & St. Mellons Rural District Council* v. *Newport Corpn.* (1). Counsel goes further; he says that, when one is looking at a penal statute, still more so when one is looking at a penal statute constituting a new offence, it is imperative on the court to look only at the words used, and in that connexion he refers to the judgment of POLLOCK, C.B., in *A.-G.* v. *Sillem* (2). There, POLLOCK, C.B., said:

> "We have had in this country no court of criminal equity since the Star Chamber was abolished, as LORD CAMPBELL called it, in a case tried before him . . . BLACKSTONE, J., well lays down the rule: 'The freedom of our constitution will not permit that *in criminal cases* a power should be lodged in any judge to construe the law otherwise than *according to the letter*' . . . If I were asked whether there be any difference left between a criminal statute and any other statute not creating an offence, I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law."

Counsel also refers to *Coe* v. *Lawrance* (3). From there counsel goes on to contend that, if the sentence in s. 7 is read literally, it in fact makes a grammatical sentence, one can give to each word a meaning, and, accordingly, he says that, even if the result may be absurd, there is no ground for making any alteration in the language or reading any words into it. The court feels that it is at that point that it is constrained to depart from counsel's argument. It seems to this court that, where the literal reading of a statute, and a penal statute, produces an intelligible result, clearly there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament. Here, however, we venture to think that the result is unintelligible. LORD COLERIDGE, J., in *A.-G.* v. *Beauchamp* (4), put it quite shortly in these words:

> "Unquestionably, when one is construing a penal statute, the first thing is to construe it according to the ordinary rules of grammar, and if a construction which satisfies those rules makes the enactment intelligible, and especially if it carries out the obvious intention of the legislature as gathered from a general perusal of the whole statute, that grammatical construction ought not to be departed from."

We think that the literal construction here produces an unintelligible result, and for many reasons. In the first place, there is an obvious difficulty as to what is qualified by the words "and does any act preparatory to the commission of an offence". Does it qualify all the alternatives that have gone before? Does it qualify only the words that have followed the last comma, namely, "or aids and abets", or does it qualify only the last word "abets"? If it qualifies all that has gone before, clearly in regard to an attempt it makes nonsense, because an act preparatory to the offence is something more remote than an act which constitutes an attempt, and, accordingly, it is meaningless in connexion with attempts, and, indeed, it is difficult to give it a meaning with regard to "solicits or incites or endeavours to persuade". If, on the other hand, it qualifies only the words "or aids or abets", or the word "abets" alone, then immediately one asks: What is the sense of it applying to those words and not to the words "solicits or incites or endeavours to persuade". Whichever way it is read, an absurd result is obtained. Secondly, it is to be observed that,

(1) 115 J.P. 613; [1951] 2 All E.R. 839; [1952] A.C. 189.
(2) (1864), 2 H. & C. 431; *on appeal*, 10 H.L. Cas. 704.
(3) (1853), 17 J.P. 342; 1 E. & B. 516.
(4) 84 J.P. 41; [1920] 1 K.B. 650.

but for these words, an aider or abettor by reason of the Accessories and Abettors Act, 1861, would have committed an offence, and, accordingly, if the argument is right and the literal interpretation is given, it results in this, that, in a matter which involves the the security of the state, the offence of aiding and abetting is limited to aiding and abetting in which an act preparatory to the commission of an offence has taken place. Thirdly, it is to be observed that the conception of doing an act preparatory to the commission of an offence had been considered by the courts before the passing of the Act of 1920. As long ago as in 1855, in *R.* v. *Eagleton* (1), PARKE, B., was considering the sort of acts which would constitute an attempt and drawing a distinction between those acts and acts which were more remote and which were merely acts of preparation. Again, in *R.* v. *Linneker* (2), the court drew a distinction between acts of preparation and acts which would constitute attempts, and in *R.* v. *Robinson* (3) the same distinction was drawn. Then, before *R.* v. *Robinson* (3), in the regulations made in the war of 1914-1918, the Defence of the Realm (Consolidation) Regulations, 1914, reg. 48, it was provided:

> " Any person who attempts to commit, or procures aids or abets, or does any act preparatory to, the commission of, any act prohibited by these regulations, or harbours any person whom he knows, or has reasonable grounds for supposing, to have acted in contravention of these regulations, shall be guilty of an offence against these regulations."

Passing for a moment to the period after the passing of the Act of 1920, it is to be observed that by reg. 28 of the Emergency Regulations, 1921, it was again provided that

> " Any person who . . . does any act preparatory to, the commission of any act prohibited by these regulations . . . shall be guilty of an offence against these regulations."

Similar words appear in the Defence (General) Regulations, 1939, reg. 90 (1), in force during the Second World War. Each context, be it observed, where this sort of situation is being discussed and enactments are made in regard to it, is considering the doer of an act preparatory to the commission of an offence by him, and it seems to the court that the natural meaning of the words refers to that. If one tries to read those words as a qualification of aiding and abetting, the result becomes absurd, because the essence of aiding and abetting is the aiding and abetting of someone else to commit an offence, and to say it is a qualification of that that a man should do an act preparatory to the commission of an offence by himself is pure nonsense.

Accordingly, for all those reasons it seems to this court that no intelligible meaning can be given to this section if it is read literally, and, accordingly, this court agrees with the learned judge. The learned judge thought that the natural way of getting over the difficulty was to read into the Act after the word " and " and before the word " does " the opening words of the section, " Any person who ", so that it would read, " or aids or abets and any person who does any act preparatory to the commission of an offence under the principal Act or this Act . . ." The court on the whole prefers to read the word " or " for " and ", because, if the words " any person who " are inserted, it leaves the words " aids or abets " in the air, whereas if " and " is changed to " or " it will read in this way: " or aids or abets or does any act preparatory to "—and then I insert a

(1) 19 J.P. 546; Dears. C.C. 376, 515.
(2) 70 J.P. 293; [1906] 2 K.B. 99.
(3) 79 J.P. 303; [1915] 2 K.B. 342.

comma—" the commission of an offence ". Indeed, read in that way it happens very closely to correspond with the only two enactments near the time, namely, the Regulations of 1914 and the Regulations of 1921.

Counsel for the appellant has quite rightly pointed out that, although the court has on occasions read "and" for "or" and "or" for "and", it has with one exception been in order to produce a result more favourable to the subject. The court feels, however, that, on principle, there is no reason, if compelled to that end, why the words should not be changed even though the result is less favourable to the subject, and, indeed, that was done in *A.-G.* v. *Beauchamp* (1). In that case ROWLATT, J., having referred to the manifest absurdity which would arise if a literal construction was given, went on in this way:

> " It is not really a question of adding anything to the section, for it is quite clear what the intention was, and the omission of certain words that you would expect to find there is nothing more than a faultiness of expression."

It seems to the court that it is quite clear in the present case what the intention was, and that there has been merely a faultiness of expression. Again, MCCARDIE, J., who agreed with ROWLATT, J., said at the end of his judgment:

> " That seems to be the reasonably plain meaning of the section which we have to consider, while it is in agreement with the earlier legislation on the subject."

Everything that was said by those two judges seems to this court to apply fully in the circumstances of this case. Accordingly, the court will read " or " for " and ", and this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal*; *Director of Public Prosecutions.*

T.R.F.B.

(1) 84 J.P. 41; [1920] 1 K.B. 650.

COURTS-MARTIAL APPEAL COURT

(LORD PARKER, C.J., STREATFEILD AND HINCHCLIFFE, JJ.)

March 24, 25, 1959

R. *v.* SMITH

Criminal Law—Evidence—Admissibility of statement—Alleged threat—Soldiers kept on parade by regimental sergeant-major till prisoner confessed—Subsequent confession to sergeant of Special Investigation Branch—Dissipation of original threat.

Criminal Law—Murder—Causation of death—Bayonet wound—Haemorrhage of lung—Incorrect medical treatment—Good chance of recovery if proper treatment given.

The appellant, a private in the King's Regiment, was convicted in Germany of the murder of a private of the Gloucestershire Regiment. The charge arose out of an incident on the night of Apr. 13, 1958, between men of the King's Regiment and men of the Gloucestershire Regiment who were then sharing barrack accommodation, during which three men of the Gloucestershire Regiment, including Private C, received stab wounds. The judge-advocate admitted evidence (i) of a confession by the appellant to the regimental sergeant-major of the King's Regiment, who stated that he called a late night parade soon after the incident, at which he said that he would keep the company on parade till someone admitted the stabbing, and that the appellant eventually stepped forward and said: "I did the stabbing"; (ii) of a subsequent confession by the appellant to a sergeant of the Special Investigation Branch the following morning. The sergeant gave the appellant the usual caution and went on to refer to what had happened the night before and the appellant's admission to the sergeant-major, and the appellant replied: "Yes, I am not denying it. I stabbed three of them all right." Subsequently, he made a written statement to the same effect. On appeal,

HELD: (i) that, though there was nothing improper in the action taken by the regimental sergeant-major, his conduct at the parade amounted to a threat, which rendered the appellant's first statement inadmissible, but, as the effect of any threat under which the first statement was made had been dissipated by the time when the appellant was interviewed by the sergeant of the Special Investigation Branch, the oral and written statements made to him were admissible; (ii) if at the time of death the original wound was still an operating and substantial cause, then death could properly be said to be the result of the wound even if some other cause of death was also operating, and the summing-up on causation was adequate. The appeal, therefore, must be dismissed.

APPEAL against conviction.

The appellant, Thomas Joseph Smith, a private soldier in the first battalion of the King's Regiment, was convicted by a general court-martial sitting at Verden, Germany, on July 2, 1958, of the murder of Private David Creed, of the Gloucestershire Regiment, at Sennelage on Apr. 13, 1958, and was sentenced to imprisonment for life. He appealed against his conviction, the main grounds of appeal being (a) that confessions alleged to have been made by him were wrongly admitted as evidence at the trial, and (b) that the summing-up by the judge-advocate on the question of causation was defective. The facts, which are summarised in the headnote appear fully in the judgments.

Bowen, Q.C., and *Woolf* for the appellant.
Garth Moore for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant was a private soldier in the King's Regiment. At the material time a company of the King's Regiment were sharing barracks with a company of the Gloucestershire Regiment, and on the night of Apr. 13, 1958, a fight developed. As a result of that fight three members of the Gloucesters were stabbed with a bayonet and one of them, Private Creed, subsequently died. It

was for his murder that the appellant was convicted by a general court-martial in Germany. He was sentenced to imprisonment for life.

In this court several points have been quite properly taken by counsel for the appellant, but there are, in the view of the court, only two which merit consideration. The first one is the question whether two alleged confessions given by the appellant were wrongly admitted in evidence. It is a vital point because it would be conceded, I think, that in the absence of the evidence of those confessions there would have been at the end of the case for the prosecution no evidence at all against the appellant.

The confessions arose in this way. The fight took place just before 10 p.m., and immediately after the fight the regimental sergeant-major of D company of the King's Regiment, having heard that there had been a fight and, as far as he knew, that two men had been stabbed—he did not know of the third and, indeed, Private Creed had not then died—put the company on parade in one of the barrack rooms, and he used words to the effect: " I am going to get to the bottom of this fighting and whoever did it must step forward." He indicated quite plainly that his intention was to keep them there until he could get to the bottom of the matter. Nobody did step forward, and he then addressed each man personally asking them where they were and, so far as this appellant is concerned, he got the answer: " I was in bed." The regimental sergeant-major still was not satisfied and he then said words to the effect: " I am not leaving, I am staying here until you give me an answer about this fight." It was at that point that the appellant stepped forward and said: " I did the stabbing." He was then asked what weapon he had used, and he replied: "A bayonet which was by the bed in the barrack room."

The court is quite clear that, while there was nothing improper in the action taken by the regimental sergeant-major, the evidence of what took place was clearly inadmissible at the appellant's trial. What the sergeant-major did might well have been a very useful course of action in order to enable further inquiries to be made, but the court is quite satisfied that, if the only evidence against the appellant was a confession obtained in those circumstances, it would be quite inadmissible at his trial. It has always been a fundamental principle of the courts, and something quite apart from the Judges' Rules of Practice, that a prisoner's confession outside the court is only admissible if it is voluntary. In deciding whether an admission is voluntary, the court has been at pains to hold that even the most gentle, if I may put it in that way, threats or slight inducements will taint a confession. To say to a man in the presence of the rest of his company, or rather to say to all those on parade, " You are staying here and are not going to bed until one of you owns up " is, in the view of this court, clearly a threat. It might also, I suppose, be looked on as an inducement in that the converse is true, " If one of you will come forward and own up, the rest of you can go to bed." Whichever way one looks at it, the court is clearly of opinion that, while the action was perfectly proper and a useful start, no doubt, to inquiries, evidence in regard thereto was clearly inadmissible.

The matter, however, does not rest there, because at about 7.30 the next morning Sergeant Ellis from the Special Investigation Branch came down to make inquiries, and he, when he first saw the appellant, gave him the usual caution. He, however, went on to refer then to what had happened the night before. Apparently, after administering the caution, he said:

" There was a disturbance last night in a barrack room in Polish Barracks. I understand that after the disturbance you admitted to your R.S.M. that

you had been involved and that you stabbed three men of the Gloucestershire Regiment."

Apparently Sergeant Ellis by then had been told that three men were involved. The appellant replied: "Yes, I am not denying it. I stabbed three of them all right." He was then asked if he wished to make a statement. He said: "Yes." A written caution was then made which the appellant signed, and there followed a statement which I need not read, but which admitted that he had stabbed about three of them altogether with a bayonet which he found on the floor of the room.

It was urged by counsel for the appellant that the original taint in the confession given to the sergeant-major really persisted in these later confessions, both oral and in writing, and, in particular, counsel pointed to the fact that Sergeant Ellis at the outset referred to what had taken place, or what was said to have taken place, the evening before. Counsel for the appellant also referred us to a number of cases. It is unnecessary to refer to them in detail. He started with *R.* v. *Meynell* (1), where, in regard to a second confession, TAUNTON, J., said:

> "I am clearly of opinion, that it is not receivable; it being impossible to say that it was not induced by the promise which the constable made to her in the morning."

In other words, he was saying that the second statement was inadmissible in that a promise made when the first statement was given was still in operation when the second statement was given. To the same effect was the opinion of PATTESON, J., in *R.* v. *Sherrington* (2), where he said:

> "There ought to be strong evidence to show that the impression under which the first confession was made, was afterwards removed, before the second confession can be received. I am of opinion, in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination."

I should observe that in neither of those cases was a caution administered before the second statement was obtained

Counsel also referred to an Irish case, *R.* v. *Doherty* (3), where WHITESIDE, C.J., in ruling on the admissibility of the second statement, said:

> "The judges have held that it must be shown that the prisoner thoroughly understood that he could expect no gain from a confession. The subsequent caution must be shown to have had the effect of removing all such expectation from the prisoner's mind."

Again, in *R.* v. *Rue* (4), DENMAN, J., said:

> "There are cases which hold that a confession once rejected on the ground that it was made under an inducement does not become admissible merely from the fact that it was again made to some other person who has not held out an inducement, the inducement being deemed to be a continuing one. But I am not at this moment aware of any case in which it has been held that, where the person who held out the inducement is absent, then a confession made to a third party is not admissible, no fresh inducement having been held out. The general principle is clear, that if it is made out

(1) (1834), 2 Lew C.C. 122.
(2) (1838), 2 Lew. C.C. 123.
(3) (1874), 13 Cox, C.C. 23.
(4) (1876), 34 L.T. 400; 13 Cox, C.C. 209.

to the satisfaction of the judge that the statement was not made voluntarily, it is not admissible. It is not merely a question as to whom the confession is made or when it is made; but it is a matter in which you have to get at the mind of the prisoner, and see whether or not it is probable that the confession was made voluntarily, in the proper sense of the word."

Having consulted KELLY, C.B., DENMAN, J., held on the facts of that case that the second statement was so connected with the original inducement as to be inadmissible.

The court thinks that the principle to be deduced from the cases is really this: if the threat or promise under which the first statement was made still persists when the second statement is made, then the second statement is inadmissible. Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement. In the present case, the judge-advocate never had to rule on the confessions on the second occasion. As he had admitted the first confession, there was no question but that the confessions on the second occasion must be also admissible. Accordingly, he never had to rule on the question of admissibility. He never had to exercise any discretion in the matter, and there was no occasion for his leaving it to the court to determine the value or weight to be attached to the later confessions. This court, however, is of the clear opinion that the later confessions were admissible. No doubt, the opening reference to what the appellant was said to have said to the regimental sergeant-major put the appellant in a difficulty. No doubt it was introduced by Sergeant Ellis in the hope that thereby he might get a continued confession; but it is quite clear that the effect of any original inducement or threat under which the first confession was made had been dissipated. Quite apart from the fact that the caution was given, and given twice, some nine hours had elapsed and the whole circumstances had changed. The parade had ended. The rest of the company had gone to bed. The effect of the threat or the inducement was spent. On those grounds this court has come to the conclusion that the oral and written statements made to Sergeant Ellis were clearly admissible.

The second ground concerns a question of causation. The deceased man in fact received two bayonet wounds, one in the arm and one in the back. The one in the back, unknown to anybody, had pierced the lung and caused haemorrhage. There followed a series of unfortunate occurrences. A fellow member of his company tried to carry him to the medical reception station. On the way he tripped over a wire and dropped the deceased man. He picked him up again, went a little further, and fell apparently a second time causing the deceased man to be dropped on to the ground. Thereafter he did not try a third time but went for help, and ultimately the deceased man was brought into the reception station. There, the medical officer, Captain Millward, and his orderly were trying to cope with a number of other cases, two serious stabbings and some minor injuries, and it is clear that they did not appreciate the seriousness of the deceased man's condition or exactly what had happened. A transfusion of saline solution was attempted and failed. When his breathing seemed impaired, he was given oxygen and artificial respiration was applied. He died after he had been in the station about an hour, which was about two hours after the original stabbing. It is now known that, having regard to the injuries which the deceased man had in fact suffered, his lung being pierced, the treatment which he was given was thoroughly bad and might well have affected his chances of recovery. There was evidence that there is a tendency for a wound

of this sort to heal and for the haemorrhage to stop. No doubt his being dropped on the ground and having artificial respiration applied would halt, or at any rate impede, the chances of healing. Further, there were no facilities whatsoever for blood transfusion, which would have been the best possible treatment. There was evidence that, if he had received immediate and different treatment, he might not have died. Indeed, had facilities for blood transfusion been available and been administered, Dr. Camps, who gave evidence for the defence, said that his chances of recovery were as high as seventy-five per cent.

In these circumstances counsel for the appellant urges that, not only was a careful summing-up required, but a correct direction to the court would have been that they must be satisfied that the death of Private Creed was a natural consequence and the sole consequence of the wound sustained by him and flowed directly from it. If there was, says counsel for the appellant, any other cause whether resulting from negligence or not, if, as he contends here, something happened here which impeded the chance of the deceased recovering, then the death did not result from the wound. The court is quite unable to accept that contention. It seems to the court that, if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

There are a number of cases in the law of contract and tort on these matters of causation, and it is always difficult, when directing a jury or, as here, a court, to find a form of words which will convey in simple language the principle of causation. It seems to the court enough for this purpose to refer to one passage in the judgment of LORD WRIGHT in *Lord* v. *Pacific Steam Navigation Co., Ltd., The Oropesa* (1), where he said that, to break the chain of causation:

> "It must always be shown that there is something which I will call ultroneous, something unwarrantable, a new cause coming in disturbing the sequence of events, something that can be described as either unreasonable or extraneous or extrinsic."

To much the same effect was a judgment on the question of causation given by DENNING, J., in *Minister of Pensions* v. *Chennell* (2).

Counsel for the appellant placed great reliance on *R.* v. *Jordan* (3), a decision of the Court of Criminal Appeal, and, in particular, on a passage in the headnote which says:

> "... that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury, but that the same principle does not apply where the treatment employed is abnormal."

Reading those words into the present case, counsel for the appellant says that the treatment which Private Creed received from the moment when he was struck until the time of his death was abnormal. The court is satisfied that *R.* v. *Jordan* (3) was a very particular case depending on its exact facts. It incidentally arose in the Court of Criminal Appeal on the grant of an application

(1) [1943] 1 All E.R. 211; sub nom. *The Oropesa*, [1943] P. 32.
(2) [1946] 2 All E.R. 719; [1947] K.B. 250.
(3) (1956), 40 Cr. App. Rep. 152.

to call further evidence, and, leave having been obtained, two well-known medical experts gave evidence that in their opinion death had been caused, not by the stabbing, but by the introduction of Terramycin after the deceased had shown that he was intolerant to it and by the intravenous introduction of abnormal quantities of liquid. It also appears that, at the time when that was done, the stab wound, which had penetrated the intestine in two places, had mainly healed. In those circumstances the court felt bound to quash the conviction because they could not say that a reasonable jury, properly directed, would not have been able, on that evidence, to say that there had been a break in the chain of causation; the court could uphold the conviction in that case only if they were satisfied that no reasonable jury could have come to that conclusion.

In the present case it is true that the judge-advocate did not, in his summing-up, go into the refinements of causation. Indeed, in the opinion of this court, he was probably wise to refrain from doing so. He left to the court the broad question whether they were satisfied that the wound had caused the death in the sense that the death flowed from the wound, albeit that the treatment which the deceased man received was, in the light of after-knowledge, a bad thing. In the opinion of this court, that was, on the facts of the case, a perfectly adequate summing-up on causation; I say " on the facts of the case " because, in the opinion of the court, they can only lead to one conclusion: A man is stabbed in the back, his lung is pierced and haemorrhage results; two hours later he dies of haemorrhage from that wound; in the interval there is no time for a careful examination and the treatment given turns out in the light of subsequent knowledge to have been inappropriate and, indeed, harmful. In those circumstances no reasonable jury or court could, properly directed, in our view possibly come to any other conclusion than that the death resulted from the original wound. Accordingly, the court dismisses this appeal.

Appeal dismissed.

Solicitors: *Registrar of the Courts-Martial Appeal Court; Director of Army Legal Services.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

April 14, 1959

CATER *v.* ESSEX COUNTY COUNCIL

Town and Country Planning—Enforcement notice—Validity—Inaccurate statement of fact—Allegation that development was carried out without planning permission—General order giving permission for twenty-eight days—Town and Country Planning Act, 1947 (10 *and* 11 *Geo.* 6, *c.* 51), *s.* 23 (1)—*Town and Country Planning General Development Order*, 1950 (*S.I.* 1950, *No.* 728) *art.* 3 (1), *sched.* 1, *Class IV*, *para.* 2.

The appellant was the owner of land which prior to 1954 was used as a smallholding. In that year he began to use the land as a caravan site. An application for permission to use the land for that purpose was refused by the planning authority under the Town and Country Planning Act, 1947, and, on appeal, by the Minister. On Dec. 12, 1956, the planning authority served on the appellant an enforcement notice under s. 23 (1) of the Act of 1947 requiring him within three months to discontinue " the use of the said land comprising the said development " and stating that " it appears to the [planning authority] that development consisting of a material change of use has been carried out on the land . . . without the grant of permission required in that behalf under Part 3 of the Act, the said land being used for the purpose of a caravan site ". By the Town and Country Planning General Development Order, 1950, art. 3 (1) and sched. 1, Class IV, para. 2, general permission was given for the " use of any land for any purpose on not more than twenty-eight days in total in any calendar year, and the erection or placing of movable structures on the land for the purposes of that use ". The appellant was convicted at a magistrates' court of using the land for the purpose of a caravan site in contravention of the enforcement notice. On appeal,

HELD, that the permission afforded by art. 3 (1) of the Order of 1950 and para. 2 of Class IV of sched. 1 to the Order was a permission granted under Part 3 of the Act of 1947 in relation to the land when the caravans were first brought on to it; that the statement of fact in the enforcement notice was untrue, thereby rendering the notice a nullity; and that, accordingly, the conviction must be quashed.

CASE STATED by Essex justices.

The Essex County Council, as local planning authority, preferred an information against the appellant Cater alleging that he on Apr. 14, 1958, at Romford without the grant of permission in that behalf under Part 3 of the Town and Country Planning Act, 1947, used land at Cummings Hall Farm, Bear Lane, Romford, for the purpose of a caravan site in contravention of an enforcement notice dated Dec. 12, 1956, which required such use to be discontinued, contrary to s. 24 of the said Act. The information was heard at Romford Magistrates' Court on July 25, 1958, when the justices found the offence proved and fined the appellant in the sum of £20. The facts found by the justices appear from the headnote and the judgment of LORD PARKER, C.J. It was contended by the appellant (a) that the facts alleged and proved did not amount to a breach of the enforcement notice; (b) that the prosecution was out of time; (c) that the enforcement notice was bad in that it did not comply with s. 23 of the Act of 1947, because the notice failed to specify the development as required by that section, it made no allegation of the manner in which the use of the land was said to have been changed, and it made no allegation of the date on which any such change occurred; (d) that the enforcement notice was bad in that it alleged that development consisting of a material change of use had been carried out without the grant of the requisite permission whereas in fact permission for the alleged change of use was granted by the Town and

Country Planning General Development Order, 1950, art. 3 and sched. 1, Class IV, para. 2. The justices did not require the planning authority to argue on any of those submissions. They were of the opinion that the enforcement notice was valid, that the facts proved amounted to a breach of the notice and that the prosecution was in time. The appellant appealed.

Megarry, Q.C., and *R. Higgins* for the appellant.
Lawton, Q.C., and *Marriage* for the planning authority.

LORD PARKER, C.J.: This is another of the many difficult cases which have arisen in regard to an enforcement notice under the Town and Country Planning Act, 1947, s. 23 (1). The matter comes before the court by way of Case Stated by Justices for the Petty Sessional Division of Romford, before whom the appellant was charged that on Apr. 14, 1958, at Romford,

> " without the grant of permission in that behalf under Part 3 of the Town and Country Planning Act, 1947, used certain land at Cummings Hall Farm, Bear Lane, Romford, for the purpose of a caravan site in contravention of an enforcement notice dated Dec. 12, 1956, which required such use to be discontinued, contrary to s. 24 of the Town and Country Planning Act, 1947."

The justices were faced with several technical points which were taken by the appellant, who was the party charged, and one has very great sympathy with them when, all the merits being with the respondents, the County Council of Essex, they thought nothing of the points raised, and indeed did not require the county council to argue on them. They accordingly found the offence proved and fined the appellant £20.

The short facts giving rise to the matter were these: The appellant was at all material times the owner of a little over six acres of land which apparently prior to 1954 were used as a smallholding. In that year, 1954, he allowed caravans to be parked on the land, and by Jan. 21, 1955, the number had increased to about ninety caravans. Application was made to the local planning authority for permission and it was refused. There was an appeal to the Minister, a local inquiry was held, and in due course on July 19, 1956, the Minister gave his decision, which was to the effect that he had decided that the appeal must be dismissed, but that, as the notice went on:

> " While he deprecates the bringing of this camp into use without planning permission, he has much sympathy with the caravan occupiers and he relies on the county council to give full weight to the need to avoid hardship in pursuing any enforcement action they may see fit to take."

Thereupon, on Dec. 12, 1956, the respondents served an enforcement notice on the appellant requiring him within three calendar months of the date when the notice was to take effect

> " to discontinue the use of the said land comprising the said development and to restore the said land to its condition before the said development took place such restoration to be carried out to the satisfaction of the county planning adviser."

I must refer in due course in more detail to the enforcement notice. That enforcement notice was enclosed in a letter of the same date in which the county council, in giving effect to the hopes expressed by the Minister, informed the appellant that they would not prosecute provided, to put it generally, he took steps to reduce gradually the number of caravans and ultimately in three years to discontinue the use. However, by Mar. 11, 1958, the county council were not

satisfied that the appellant was complying with that offer; indeed it appeared that there were then over one hundred caravans still on the site, and so they wrote to the appellant again and in effect said that if the number of caravans was not substantially reduced, in fact to some fifty-six in number by Apr. 14, 1958, they would prosecute. In due course, the appellant having taken no steps in the matter, this information was laid. Pausing there, I should have thought the merits were wholly with the county council. The appellant has flagrantly avoided compliance with the intentions of the planning authority and the Minister, but a number of technical points have been raised, and whether technical or not, if they are good points, the appellant is entitled to succeed.

The prosecution was under s. 24 of the Act of 1947. Section 24 (3) provides:

> "Where, by virtue of an enforcement notice, any use of land is required to be discontinued, or any conditions are required to be complied with in respect of any use of land or in respect of the carrying out of any operations thereon, then if any person, without the grant of permission in that behalf under this Part of this Act, uses the land or causes or permits the land to be used, or carries out or causes or permits to be carried out those operations, in contravention of the notice, he shall be guilty of an offence and liable on summary conviction to a fine . . ."

Be it observed that it is a condition precedent that there should be an enforcement notice and, of course, a valid enforcement notice. Counsel for the appellant takes first and foremost the point that this was not a valid enforcement notice in that what I may call the factual basis of it was incorrect, and he refers to the decision of the Court of Appeal in *Francis* v. *Yiewsley & West Drayton U.D.C.* (1). It is unnecessary, I think, to refer to the details of that case, but the enforcement notice had recited that the land was developed by the placing thereon of caravans without the grant of planning permission required. In that case, though, when the development by the placing of caravans on the site first took place, there was no permission, there had in fact been later, pursuant to s. 18 of the Act of 1947, what I may call a retrospective permission by the Minister which was to be for a period of six months. The Court of Appeal held that in those circumstances the recital in the enforcement notice was wrong in that permission had been obtained, albeit retrospectively; and they held further that, the recital being wrong, the whole enforcement notice was a nullity, and that is the important point of the decision from the point of view of the present case.

In the present case counsel for the appellant points to the fact that under the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), permission is given by art. 3 (1) and sched. 1, Class IV, para. 2, for

> "The use of land . . . for any purpose on not more than twenty-eight days in total in any calendar year, and the erection or placing of movable structures on the land for the purposes of that use."

Accordingly, says counsel, this is an a fortiori case in the light of *Francis* v. *Yiewsley & West Drayton U.D.C.* (1) in that on the first day when caravans were brought on to the site there was certainly then a change of use, and, therefore, a development and there existed permission pursuant to the Development Order of 1950. The enforcement notice recites:

> "Whereas it appears to the county council that development consisting of a material change of use has been carried out on the land described in the schedule hereto without the grant of permission required in that behalf

(1) [1957] 3 All E.R. 529; [1958] 1 Q.B. 478.

under Part 3 of the Act, the said land being used for the purpose of a caravan site."

Accordingly, says counsel for the appellant, when that development first took place, when caravans were first brought on to this site, there was in fact permission under Part 3 of this Act in that the Development Order of 1950, which was made under s. 13 of the Act of 1947, had permitted that development.

In order to test the validity of that argument, it is necessary to look at a few of the sections of the Town and Country Planning Act, 1947, itself. Part 3, which is the relevant Part, commences with s. 12 which, so far as is material, provides:

"(1) Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day.

"(2) In this Act, except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land . . ."

The sub-section then goes on, by a series of paragraphs in a proviso to provide that certain changes of use of land shall not be deemed to be development at all. By s. 12 (5) certain other development is referred to which, though deemed to be development, shall not be development for which permission is required. By s. 13 (1) it is provided:

"The Minister shall by order provide for the grant of permission for the development of land under this Part of this Act, and such permission may be granted—(a) in the case of any development specified in any such order, or in the case of development of any class so specified, by that order itself; (b) in any other case, by the local planning authority (or, in the cases hereinafter provided, by the Minister) on an application in that behalf made to the local planning authority in accordance with the provisions of the order."

Accordingly it will be seen that the scheme of the Act was first of all to exclude certain types of development by providing that they should not be development; secondly, to set up a second category of development which, though it remained development under the Act, would not require permission; and thirdly, to provide that in all other cases permission was required and might be granted either by a development order specifying any classes of development or, in other cases, by the ordinary applications to the local planning authority and, through the planning authority to the Minister, for permission to develop. Observe that in the passage in s. 13 (1) which I have read it is said that permission "may be granted", and if one looks further on in that same section there is a constant reference to that. Thus, in sub-s. (2) it is provided:

"An order under sub-s. (1) of this section . . . may be made either as a general order applicable . . . to all land, or as a special order applicable only to such land as may be so specified, and the permission granted by any such order may be granted either unconditionally or subject to such conditions . . ."

Accordingly, again that provision in referring, as it does, to the general order as well as the special order is speaking of permission being thereby granted; indeed, in sub-s. (3) and sub-s. (4) there are phrases to the same effect. Therefore, it seems to me clear that a permission which appears by reason of inclusion in sched. 1 to the Development Order of 1950 is not an exception from the obtaining of permission, but is itself the grant of permission. Accordingly, for my part, I think, and indeed I think counsel for the county council would concede, that

on a literal interpretation of those sections the use of the land for twenty-eight days as a caravan site was a permission granted under Part 3 of the Act.

Section 23 (1), which is providing for the enforcement notice, provides:

> "If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with . . ."

the authority may within four years of such development being carried out serve on the owner and occupier an enforcement notice. Accordingly, it seems to me to be clear that in a case where the Development Order of 1950 applies, there has been the grant of permission required in that behalf under Part 3 of the Town and Country Planning Act, 1947, and, if that be right, the recital in the enforcement notice in this case is not true in fact. Its basis is inaccurate, and on the authority of the Court of Appeal in *Francis* v. *Yiewsley & West Drayton U.D.C.* (1) the enforcement notice is a nullity.

It is a point of no merit. Certainly nobody was deceived, least of all the appellant, as to what he was being required to do, but these provisions are provisions which have to be strictly complied with. As VISCOUNT SIMONDS said in *East Riding County Council* v. *Park Estate (Bridlington), Ltd.* (2) :

> "It was in the first place contended that the Act of 1947 was highly technical and, as it encroached on private rights, the court must insist on strict and rigid adherence to formalities. This, as a general proposition, commands assent and not the less because disregard of an enforcement notice is an offence involving sufficiently serious penal consequences."

It is said on the other side that the court should not give the literal interpretation to the words in the various sections to which I have referred in that to do so would really drive a coach-and-four through the powers of local authorities in regard to enforcement notices. It is said that unless the permission for the temporary user for twenty-eight days is treated as a conditional permission it would be quite impossible to frame an enforcement notice which was valid, and arguments have been addressed to the court to suggest that the permission for the twenty-eight day user is not a conditional permission at all. For my part I do not propose in this case to decide what the effect of that provision is, whether it can be said that it is merely a description of a limited development or whether it is a development with an implied condition that it shall cease at the end of twenty-eight days. I find it unnecessary to decide that case, because, even if it is not a condition (and I myself suggested that this or similar permission might be conditional in *Francis* v. *Yiewsley & West Drayton U.D.C.* (1)), I cannot think that this is a case where the court in effect is entitled to re-write an Act of Parliament. It is not merely a case where the insertion of a word by necessary implication will cure the mischief. It is not a case, as sometimes happens, where the court is constrained to use the word " or " and make it conjunctive or anything like that. It is a matter of re-writing a considerable number of sections in an Act of Parliament. LORD SIMONDS in *Magor & St. Mellons Rural District Council* v. *Newport Corpn.* (3), gave a sharp reminder of the dangers of a court usurping the powers of the legislature. I need not refer to the passages because they are well known. I, for my part, feel that the words in the Act are so clear that, whatever their effect may be, this court must give effect to them.

(1) [1957] 3 All E.R. 529; [1958] 1 Q.B. 478.
(2) 120 J. P. 380; [1956] 2 All E.R. 669; [1957] A.C. 223.
(3) 115 J.P. 613; [1951] 2 All E.R. 839; [1952] A.C. 189.

I should add that two other points were taken which, if valid, would not necessitate what I may call the re-writing of the Act at all. It is said, first, that in s. 12 (2) there is a definition of "development" which is the meaning in the Act except where the context otherwise requires. It has been said that in s. 23 (1) it might be possible to read "development" as meaning something different, in particular as applying to a continuation of a permitted use after the permission had expired. For my part, I find it impossible to say that there is any context in s. 23 which requires such an interpretation. Certainly the context of the Development Order of 1950 itself cannot be imported. The most that could be said would be that s. 13 has intervened between s. 12 and s. 23 but there is nothing in s. 13 which would suggest that a temporary user for twenty-eight days, such as we are considering here, was to be a matter for a development order.

Secondly, it has been suggested that it might be possible to read "permission required" in s. 23 as referring only to the permission required in the ordinary sense, viz., by applications made to the local authority and through the local authority to the Minister and that in this context "permission required" does not refer to a general permission, if one may use that phrase, as under the General Development Order. Again, I find it quite impossible under the scheme in this Act to which I have referred to say that "permission required" in s. 23 is limited in that way. In particular, it is relevant to observe that s. 13 deals in one and the same section and in one and the same sub-section with permissions which may be granted whether it be on an application to the local authority in individual cases or whether by means of a general or special order. In my judgment, sorry as I am to come to that conclusion, I fear that the technical point succeeds and that this appeal must be allowed.

I would only add that counsel for the appellant took several other points as to the validity of the enforcement notice, and he further contended that the prosecution was too late in point of time. In view of the opinion at which I have arrived on his main point, I find it unnecessary to deal with his other points, and I do not propose to do so.

DONOVAN, J.: I feel bound, and with the like reluctance, to agree. The construction which this court is now putting on the words "permission required in that behalf under this Part of this Act", viz., that such permission is given inter alia by the Town and Country Planning General Development Order, 1950, granting twenty-eight days' permission, will make the enforcement of planning control even more difficult than it is already, and perhaps in a large number of cases impossible. For that reason I have sought a construction of the words which would avoid the result which I do not think Parliament could ever have intended. In this search I have failed. I think the words themselves are clear, and it is not necessarily the case that the purpose of the Act will be completely defeated if the words are given their ordinary meaning.

In these circumstances to agree with the modifications in the language of s. 12, s. 23 and s. 24 of the Town and Country Planning Act, 1947, which would be required to defeat the appellant's argument are not as a matter of construction justified. Furthermore, I think that the difficulty can probably be cured by a simple amendment, e.g., of s. 23 and s. 24 of the Act to the effect that in the application of those sections any permission granted under para. 2 of Class IV of sched. 1 of the Development Order of 1950 should be disregarded.

SALMON, J.: I agree. *Appeal allowed.*

Solicitors: *James & Charles Dodd; Sharpe Pritchard & Co.*, agents for *Clerk of Essex County Council.* T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

April 10, 14, 1959

KAHN *v.* NEWBERRY

Shops—Hours of Closing—"Place" where retail trade or business carried on—Costermonger's barrow—Sale in street after closing time—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *s.* 12.

By s. 12 of the Shops Act, 1950, it is unlawful "to carry on in any place not being a shop" a retail trade or business at a time when it would be unlawful to keep a shop open in the same locality for retail trade or business of the same class. The appellant sold apples from a costermonger's barrow in a street at an hour when it would be unlawful for a shop to be open in the same locality for such sale. The barrow, although then stationary in the street, had no fixed location there. The appellant, who was convicted of an offence against s. 12, appealed.

HELD, that the conviction must be quashed, as neither the barrow itself nor the piece of ground on which it stood at the time was a "place" where the appellant was carrying on a retail trade or business within the meaning of s. 12. *Eldorado Ice Cream Co., Ltd.* v. *Clark*, (1938), 102 J.P. 147, and *Stone* v. *Boreham*, 1958, 122 J.P. 418, applied.

Per DONOVAN and SALMON, JJ.: The case of the street hawker is not the case which Parliament had in mind when passing the Shops Acts.

CASE STATED by the appeal committee of the County of London Sessions.

On July 10, 1958, on a summons laid by the respondent, Newberry (a duly authorised officer acting on behalf of the London County Council), the appellant, Bidrich Kahn, was convicted by the justices of the Westminster Petty Sessional Division, sitting at Westminster City Hall, of an offence against s. 12 of the Shops Act, 1950, in that on May 6, 1958, in a place not being a shop, to wit a pitch on the east side of Great Windmill Street, London, he unlawfully carried on a retail trade or business (namely, the sale of apples) after 8 p.m., being a time when it would be unlawful in that locality under s. 2 of the Act of 1950 to keep a shop open for the purposes of retail trade or business, the sale of apples not being a transaction mentioned in sched. 2 to the Act. A fine was imposed on the appellant under s. 14 of the Act. The appellant appealed to the appeal committee of the County of London Sessions.

At the hearing of the appeal on Aug. 15, 1958, the following facts were found. On May 6, 1958, between 10.20 p.m. and 10.25 p.m., the appellant was standing beside a stationary costermonger's barrow on a pitch in Great Windmill Street, on the east side, about five yards north of the junction of Coventry Street. During that period he sold several apples to two different customers. The appellant was carrying on a trade or business not being a transaction mentioned in sched. 2 to the Shops Act, 1950. The costermonger's barrow was not a moving vehicle.

The appellant contended that the costermonger's barrow was a moving vehicle and, as such, was not liable to the provisions of the Act of 1950. The respondent contended (a) that a stationary costermonger's barrow was not a moving vehicle and was a place within the meaning of s. 2 and s. 12 of the Act of 1950; and (b) that the pitch on which retail trade or business was carried on from a stationary costermonger's barrow was a place within the meaning of s. 2 and s. 12 of the Act of 1950. The appeal committee were of the opinion that the appellant was engaged in carrying on a retail trade or business after 8 p.m. in a place not being a shop in a locality where it was unlawful to keep open a shop for the purposes of retail trade or business, and dismissed the appeal.

The appellant appealed to the Divisional Court.

The appellant appeared in person.

Paul Wrightson for the respondent.

LORD PARKER, C.J.: I will ask DONOVAN, J., to give the first judgment.

DONOVAN, J.: This is an appeal by way of Case Stated from a decision of the appeal committee of the County of London Sessions dismissing an appeal by the appellant against his conviction by the Westminster justices for trading in contravention of the terms of s. 12 of the Shops Act, 1950. The Case finds that the appellant on May 6, 1958, sold apples from a barrow which was stationary at the time in Great Windmill Street. Section 12 provides:

> " It shall not be lawful in any locality to carry on in any place not being a shop retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class . . ."

Section 2 (1) of the same Act makes it unlawful for a shop to keep open for the serving of customers after certain hours; in the winter months, after seven o'clock in the evening on what is called " the late day " and six o'clock on any other evening; and outside the winter months after nine o'clock in the evening on the late day and eight o'clock on any other evening. The appellant, however, was serving apples from his barrow in Great Windmill Street between 10.20 p.m. and 10.25 p.m.

The appeal committee found that this business was not one of those exempted from the closure provisions of the Act of 1950 by Sch. 2 to the Act, and they further found that the appellant's costermonger's barrow was not a moving vehicle. Without giving reasons the appeal committee then decided that the appellant was in breach of s. 12 and dismissed his appeal. He now contends that they should have allowed it, and he relies on the recent decision of this court in *Stone* v. *Boreham* (1). Prior to that decision there were other cases on the same or a similar point, two in Scotland and one in England. In 1938 this court decided *Eldorado Ice Cream Co., Ltd.* v. *Clark*, *Eldorado Ice Cream Co., Ltd.* v. *Keating* (2) and held that a movable box-tricycle from which ice cream was being sold was outside the relevant provisions of the Shops (Sunday Trading Restriction) Act, 1936 [repealed and replaced by Shops Act, 1950]. Those provisions were s. 11 (1) and s. 13. Section 11 (1) laid down that

> ". . . no person shall be employed on Sunday about the business of a shop which is open for the serving of customers . . . unless the following requirements are complied with . . ."

Then followed certain requirements, which I need not detail, and which provided for extra time off for the employees. Section 13 of the Act of 1936 provided:

> ". . . the provisions of this Act shall extend to any place where any retail trade or business is carried on as if that place were a shop . . ."

In *Eldorado Ice Cream Co., Ltd.* v. *Clark* (2) this court was dealing with a decision by the justices that each of two box-tricycles from which sales were made was a " place " where retail trade or business was carried on, within s. 13 of the Act of 1936, and, therefore, was to be treated as a shop. The court held that that was wrong and that a box-tricycle was not such a place. LORD HEWART, C.J., said, among other things:

> " Here the contention was boldly made, not indeed that any warehouse was a shop, nor that the place where, at a given moment, the box-tricycle was to be found was a shop, but that each of the two box-tricycles themselves, from which sales were made, was a place where retail trade or business

(1) 122 J.P. 418; [1958] 2 All E.R. 715; [1959] 1 Q.B. 1.
(2) 102 J.P. 147; [1938] 1 All E.R. 330; [1938] 1 K.B. 715.

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was carried on within the meaning of s. 13 of the Act . . . when one looks at s. 11, and, indeed, at the whole scheme for the purposes of this Act—which begins with the provision about the closing of shops and the serving of customers in shops, which s. 11 contains the words [which he had quoted] . . . it is essential that the place where the employment is carried on must be the place which is either a shop or premises akin to a shop, so as to be a place within the meaning of s. 13. What does s. 13 say? It does not say that any retail sale at all, wherever made, shall be within the meaning of the Act; it does not prohibit the transaction of selling . . . To re-write, therefore, s. 11, as [the argument of counsel for the respondent] seeks to extend it, one gets some such result as this: 'No person shall be employed on Sunday about the business of a box-tricycle which is open for the serving of customers on that day unless the following requirements are complied with'. When one looks at s. 13, the place which is referred to is 'any place where any retail trade or business is carried on', not any apparatus by means of which, or any place from which, retail trade or business is carried on. So one finds in the proviso to s. 13, any person employed 'in connexion with the retail trade or business carried on thereat'. All through these sections one finds words which denote locality and position, a definite fixed locality or position, and so one finds in the regulations which are made under the Act [the Shops Regulations, 1937] that it is required, among other things, that the address of the place shall be stated. What would be the address of the tricycle, if the tricycle be a place?"

LORD HEWART, C.J., went on to say that the box-tricycle was not such a place, and the appeal was allowed.

Eleven years later, in 1949, *Nixon* v. *Capaldi* (1) came before the High Court of Justiciary in Scotland. That case arose under s. 9 of the Shops Act, 1912 [repealed by the Act of 1950], which provided:

> "It shall not be lawful in any locality to carry on in any place not being a shop retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class . . ."

It is to be noted at the outset that the Act of 1912 was not dealing merely with Sunday trading, as was the Act of 1936 under which the *Eldorado* case (2) arose; but it is difficult to see any material difference in the wording of the respective sections. Section 13 of the Act of 1936 was also dealing with a "place not being a shop", because the section provided that the Act should apply "as if that place were a shop". Furthermore, the kind of "place" which each Act has in view is described in similar language. In each case it must be a place where retail trade or business is carried on. The High Court of Justiciary held that, in selling ice cream from a mobile van outside permitted hours, Mr. Capaldi was in breach of s. 9 of the Act of 1912, because, in their view, he was carrying on a retail trade or business in a place not being a shop. The High Court of Justiciary were obviously not impressed with the English decision in the *Eldorado* case (2) and certain distinctions were tentatively suggested. Thus, LORD MACKAY said:

> "I agree with what your Lordship has said about that decision. It dealt with a wholly different and English Act. The statute in England was not dealing with the closing of shops in order that employees should not be over-employed or with any similar topic. It dealt with releasing Sunday

(1) 1949 S.C.(J.) 155.
(2) 102 J.P. 147; [1938] 1 All E.R. 330; [1938] 1 K.B. 715.

trading restrictions under old English Acts, and that a releasing only to a limited extent. It may be that the same words 'place other than a shop' have to receive one construction in a Scottish statute and a different construction in an English statute, inasmuch as each of these statutes deals with quite a different evil. If, however, it should fall to me to chose between the reasoning of the two learned sheriffs in Scotland and that of the Lord Chief Justice in England, I should certainly agree with the Scottish decisions, in respect, inter alia, that they correctly bring into play the main purpose of the statute and the mischief it is supposed to remedy."

The reference there to the two sheriffs is to two previous decisions which were similar to that of the High Court of Justiciary in *Nixon* v. *Capaldi* (1). I have set out above the language of s. 9 of the Act of 1912 and of s. 13 of the Act of 1936, and, as I have said, I find it difficult to detect any difference which is crucial.

Then came another case in Scotland, namely, *Cowlairs Co-operative Society, Ltd.* v. *Glasgow Corpn.* (2). That case arose under the Shops Act, 1950, which consolidated the various statutes on this subject-matter. The co-operative society was prosecuted under s. 12, as is the appellant in the present case, and it was held that, in carrying on a retail grocery trade from a mobile shop van on a vacant piece of land held on a ninety-nine years lease, and during the afternoon of a day which had been fixed as the weekly half-holiday for grocers' shops in the locality, the society was in contravention of s. 12. The van was towed to the vacant land each morning and towed back to its garage at night. The society contended that there was sufficient permanence about the arrangement to constitute the van "a shop", and that it was, therefore, not within the scope of s. 12 which refers to "any place not being a shop". This contention the High Court of Justiciary rejected, holding that the fundamental idea in the definition of a "shop" for the purposes of the Act was that the trading must be carried on from premises and that the van could not be regarded as "premises". There was a subsidiary argument for the society based on the right to elect for early closing on Saturday, which is not relevant here. There was naturally no argument to the effect that the van was not a "place" from which retail trade or business was carried on because the contrary had already been decided in Scotland in *Nixon* v. *Capaldi* (1).

Finally, in 1958 this court decided *Stone* v. *Boreham* (3), which arose under s. 58 and s. 74 (1) of the Shops Act, 1950. Section 58 reproduced the effect of s. 13 of the Shops (Sunday Trading Restriction) Act, 1936. Section 58 is in Part 4 of the Act dealing with Sunday trading, and it provides that, with certain specified exceptions which are not here material:

> "The foregoing provisions of this Part of this Act . . . shall extend to any place where any retail trade or business is carried on as if that place were a shop . . ."

Then s. 74 (1) defines "shop" as including "any premises where any retail trade or business is carried on". Accordingly, a "place" where such trade is carried on, even if it is not a shop within the definition, for example, because there are no "premises", is to be treated as if it were a shop for the purposes of s. 58. In *Stone* v. *Boreham* (3) a mobile van, equipped as a mobile shop and stocked with a variety of goods, stopped in a street on a Sunday and the owner, the

(1) 1949 S.C.(J.) 155.
(2) [1957] S.L.T. 288.
(3) 122 J.P. 418; [1958] 2 All E.R. 715; [1959] 1 Q.B. 1.

respondent in the case, sold a packet of tea to a customer standing in the roadway. If the mobile van or the site it occupied were "a place where . . . retail trade or business [was] carried on" within the meaning of s. 58, an offence was committed: see s. 47 of the Act. The argument for the appellant in that case was, not that the van was such a place because that contention was precluded by the decision in the *Eldorado* case (1), but that the ground on which the van rested at the time was such a place. That argument likewise failed, and LORD GODDARD, C.J., said:

> ". . . I cannot hold that a retail trade or business is carried on in a mobile shop. At a mobile shop no doubt retail sales are made, but that is different from saying that a retail trade or business is carried on there. A man carries on business from an address. I do not think that the words in those sections apply to a mobile van of this sort. I do not for my part think it necessary to go into a long account of the Shops Acts or the Scottish cases, because *Eldorado Ice Cream Co., Ltd.* v. *Clark* (1), to which the justices refer, which is a decision of this court, is binding on us. Whether, if the case was res integra, we might come to a different decision I need not inquire."

LORD GODDARD, C.J., went on to say that it would be really fanciful to distinguish the *Eldorado* case (1) on the ground that there the court was concerned with the box-tricycle itself, whereas, in *Stone* v. *Boreham* (2), it was concerned with the ground on which the mobile van stood, and with that view SLADE and DEVLIN, JJ., agreed. It should be said, however, that SLADE, J., remarked that, if the matter had been res integra, he would have decided otherwise, being impressed by the Scottish decision in *Nixon* v. *Capaldi* (3). DEVLIN, J., on the other hand, preferred the English decision in the *Eldorado* case (1) to that in *Nixon* v. *Capaldi* (3). He said:

> "The Shops Act, 1950, is extended by s. 58 to any place where the retail trade or business is carried on, but not to any place where the sale happens to be effected. Here the place is alleged to be an area in Peterhouse Crescent, Woodbridge, situate outside No. 106. Clearly it may well have been a dozen . . . similar places which could equally well be described as the place where a sale happened to be effected. Is that a place where any retail trade or business is carried on? Is each of them such a place? So to hold would be to strain the meaning of the Act in order to produce a result that is not in accordance with common sense. There are so many sections of the Act which make it clear that s. 58 has in mind a place where business is carried on in the ordinary sense of the word and not where any trader happens to effect a sale in the course of his business, there being to my mind a clear distinction between the two. No better section could be introduced as illustrative of that than the very section under which this prosecution was brought. That is s. 47, which says: 'Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday'. That, to my mind, makes it quite plain that the place is something which is fixed, a place where business is carried on, and not a place where a casual sale happens to be effected. The ordinary man could not make sense of a requirement of the law that, in the words of this information, he should close a place being a part of Peterhouse Crescent outside the dwelling-house No. 106. It is very undesirable that this court should strain to give

(1) 102 J.P. 147; [1938] 1 All E.R. 330; [1938] 1 K.B. 715.
(2) 122 J.P. 418; [1958] 2 All E.R. 715; [1959] 1 Q.B. 1.
(3) 1949 S.C.(J.) 155.

meanings to a section of the Act which would be to produce a result incomprehensible to the traders who have to comply with it. The result is, as my Lord has said, that it must now be taken as definitely decided in these courts that a mobile van is not a shop within the meaning of the Shops Act, 1950, and if Parliament desires to make it so it must introduce new legislation for that purpose."

In the case now before us, although the appeal committee found, among other things, that the appellant's barrow was not a moving vehicle, it is common knowledge that a costermonger's barrow is something on wheels and is pushed about. The committee can, I think, mean no more than that the barrow was not moving at the time of the sale, which is in no sense a decisive consideration, and, although this is not in the Case, the appellant told us, and we can well believe it, that he had to move about, particularly on the appearance of a policeman. If the barrow is treated as a mobile counter, I can see no relevant distinction between this case and *Stone* v. *Boreham* (1). Counsel for the respondent said that that decision and the decision in the *Eldorado* case (2) were decisions dealing with Sunday trading, whereas the two Scottish decisions and the present case dealt with weekday trading, and different statutes, at any rate originally, were involved. That is quite true. For that reason I have referred to the actual wording of the respective provisions, and I find no such difference as would, in my opinion, justify this court in not following the decision in *Stone* v. *Boreham* (1).

Two things perhaps might finally be said. This case is not the case where a stall is regularly erected on the same piece of land so that an aspect of some permanency is given to the site as one where goods are regularly sold by retail. It may be that such a place would be within the language of s. 12 and s. 58 of the Shops Act, 1950. That case can be left to be decided if and when it arises. Secondly, the case of the itinerant hawker is not, in my view, the case which Parliament had in mind when passing the various Shops Acts. My first reason for saying that is because the language of those Acts, which, as has been pointed out before in this court, seems to contemplate shops, in the ordinary sense of the word, and other places, not being shops, but with sufficient aspect of permanence about them to warrant them being treated as shops. My second reason is that, although this court held over twenty years ago that a mobile selling vehicle was not within the Shops Act, Parliament has taken no steps to bring such a contrivance within this legislation. In Scotland it would seem that the view has been taken that no undue straining of the words of the Acts is required to achieve this result. In England the opposite view has prevailed. I think that the court must follow the English view and that this appeal must be allowed.

SALMON, J.: I agree with everything that has fallen from my Lord and there is nothing that I can usefully add.

LORD PARKER, C.J.: I have come to the same conclusion. In particular, after reading the two material sections of the Shops Act, 1950, namely, s. 12 and s. 58, dealing respectively with what I may call weekday trading and Sunday trading, I can find no material distinction. It seems to me that the test or criterion to be applied, in deciding whether a piece of ground is a shop where retail trade or business is carried on, is the same under both sections. That being so, it follows that this court is bound by the English decisions to which DONOVAN, J., has referred and, in particular, by the decision of this court

(1) 122 J.P. 418; [1958] 2 All E.R. 715; [1959] 1 Q.B. 1.
(2) 102 J.P. 147; [1938] 1 All E.R. 330; [1938] 1 K.B. 715.

in *Stone* v. *Boreham* (1). Looking at the matter in the way which I have just mentioned, I can see no distinction between the barrow in the present case and the mobile van in *Stone* v. *Boreham* (1) except to a slight degree. I would, like my Lords, specifically reserve for a future occasion the question whether, if a barrow has a fixed location either by practice or by licence, it would come within the sections. It seems to me, as at present advised, that the only real difference between the decisions in England and those in Scotland turns on the degree of permanency necessary. If one looks at the judgments of LORD GODDARD, C.J., and DEVLIN, J., in *Stone* v. *Boreham* (1), I think that that becomes quite clear. The English decisions emphasise that it requires more than a casual retail sale to constitute a piece of ground the place where a retail trade or business is carried on, whereas the High Court of Justiciary in Scotland has gone the length of saying that any place from which a casual sale is carried out is a place within the section. I agree that this appeal must be allowed.

Appeal allowed.

Solicitor: *Solicitor, London County Council.*

T.R.F.B.

(1) 122 J.P. 418; [1958] 2 All E.R. 715; [1959] 1 Q.B. 1.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

April 15, 1959

NORTH *v.* GERRISH

Road Traffic—Failing to stop and give name and address after accident—Name and address given after failure to stop—Road Traffic Act, 1930 (20 *and* 21 *Geo.* 5, *c.* 43), *s.* 22 (1).

Section 22 (1) of the Road Traffic Act, 1930, creates one offence only. If either requirement remains unsatisfied by the driver of a vehicle which has been involved in an accident of the kind therein described, that is to say, if he does stop but fails to give his name and address, or if he fails to stop, but later gives his name and address, the full requirements of the subsection are not complied with and an offence is committed.

CASE STATED by Oxford justices.

An information was preferred at Oxford Magistrates' Court by the appellant, Leonard Stanley North, a police officer, charging the respondent, Percy George Gerrish, with failing to stop and give his name and address after an accident, contrary to s. 22 (1) of the Road Traffic Act, 1930, which provides: "If in any case, owing to the presence of a motor vehicle on a road, an accident occurs whereby damage or injury is caused to any person, vehicle or animal, the driver of the motor vehicle shall stop and, if required so to do by any person having reasonable grounds for so requiring, give his name and address, and also the name and address of the owner and identification marks of the vehicle." The justices found that the respondent, having come into collision with another vehicle, did not stop, but went on for over a mile. Ultimately, when stopped and asked for his name and address by an authorized person, he did give the required particulars. The justices held that no offence had been committed because they

considered that a failure to comply with both requirements was necessary to prove an offence under s. 22. Accordingly, they dismissed the information, and the prosecutor appealed.

Wellwood for the appellant.
The respondent did not appear.

LORD PARKER, C.J.: This is an appeal by one Leonard Stanley North by way of Case Stated by justices for the county borough of Oxford, before whom the respondent was charged with an offence contrary to s. 22 (1) of the Road Traffic Act, 1930. That subsection in its unamended form (it has been amended by the Road Traffic Act, 1956, but in a manner which does not affect these proceedings) reads as follows:

> "If in any case, owing to the presence of a motor vehicle on a road, an accident occurs whereby damage or injury is caused to any person, vehicle or animal, the driver of the motor vehicle shall stop and, if required to do so by any person having reasonable grounds for so requiring, give his name and address, and also the name and address of the owner and the identification marks of the vehicle."

It is unnecessary to state the facts here in detail. The magistrates found that the respondent, after coming into collision with another vehicle, did not stop. He went on for about a mile, but, when asked by an authorised person, he did give his name and address, and accordingly, the magistrates, finding that one part of the provisions of s. 22 (1) had been complied with, whereas the other had not, came to the conclusion that no offence was made out. In other words, they felt that in order that there should be an offence under s. 22 (1) there must be both elements, a failure to stop *and* failure to give his name and address. The magistrates later had occasion to re-consider their decision, and quite frankly say in the Case Stated that they are now satisfied that their decision was wrong. I agree that it is wrong. It seems perfectly clear that there is merely one offence constituted by s. 22 (1), and if either element is missing, namely, if the person fails to stop, but later gives his name and address, or if he does stop, but fails to give his name and address, the full requirements of the subsection are not complied with and an offence is constituted. This appeal must be allowed, and the case remitted to the magistrates with a direction to convict.

DONOVAN, J.: I agree.

SALMON, J.: I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.* for *A. P. M. Nixson*, Oxford.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

April 15, 1959

R. *v.* BUNGAY JUSTICES. *Ex parte* LONG

Licensing—Exemption from closing—General order—Premises in immediate neighbourhood of public market—Discontinuance of actual market—Meetings of farmers on former market days—Business done with commercial travellers—Licensing Act, 1953 (1 *and* 2 *Eliz.* 2, *c.* 46), *s.* 106 (1), (2).

Section 106 of the Licensing Act, 1953, provides: "(1) Where on application to justices . . . by the holder of a justices' on-licence for premises situated in the immediate neighbourhood of a public market . . . the justices are satisfied of the matters specified in the next following subsection, the justices may grant him [a general order of exemption] applying to the licensed premises, in addition to the permitted hours fixed . . . (2) Justices shall not grant a general order of exemption unless satisfied, after hearing evidence, that it is desirable to do so for the accommodation of any considerable number of persons attending the public market . . ."

A licensee applied for a general exemption order for his licensed premises under s. 106 (1) on Thursdays on the ground that the premises were situated in the immediate neighbourhood of a public market held on that day. Up to twenty-two years ago a cattle market was held in the market place in the town on Thursdays, but since then there was only a fruit stall there on Thursdays, a fish stall every day, and certain occasional stalls. Farmers were in the habit of coming into the town on Thursday, which was still called market day, and going into public houses around the market place to do business with each other and commercial travellers. The justices held that there was a public market in the immediate neighbourhood of the applicant's premises on Thursdays and granted the application. On application by the police for an order of certiorari to quash the general exemption order,

HELD: that a meeting of people in public houses could not constitute a public market, nor could the bar of a public house constitute a market place, and, therefore, there was no evidence on which the justices could find that there was a public market, and certiorari must issue.

APPLICATION for order of certiorari.

Up to twenty-two years ago a cattle market was held in the market place at Bungay on Thursdays, but since then there was only a fruit stall there on Thursdays, a fish stall there every day of the week, a toy stall before Christmas, and occasional stalls for charity. Licencees, however, continued to keep open on Thursdays, the former market day. On August 13, 1958, Ronald Frederick Buck, a new licensee, applied for a general order of exemption under s. 106 of the Licensing Act, 1953, for his licensed premises, the Swan Inn, situated at St. Mary Street, Bungay. The application was opposed by the police, but the justices granted the exemption. They held that there was a public market on the ground that farmers were wont to come into Bungay on Thursday, which locally was still called market day, and go into public houses round the market place to do business with each other and commercial travellers, who found it convenient to go there instead of visiting the farms. The applicant, Police Superintendent Arthur Redvers Long, obtained leave to apply for an order of certiorari to bring up and quash the justices' order.

W. M. F. Hudson for the applicant.

The respondents did not appear and were not represented.

LORD PARKER, C.J.: In this case counsel moves on behalf of Arthur Redvers Long, a police superintendent, to bring up and quash an order of justices for the petty sessional area of Bungay in Suffolk who, on Aug. 13, 1958,

granted a general order of exemption under s. 106 of the Licensing Act, 1953, to the licensee, a Mr. Buck, of the Swan public house adjoining the market place in Bungay. The section in question provides, so far as it is relevant here, that, on application to justices of the peace having jurisdiction for the purposes of the section by the holder of a justices' on-licence for premises situated in the immediate neighbourhood of a public market, the justices may grant him a general order of exemption from the provisions relating to the permitted hours fixed under ss. 101 or 102 of the Act. By sub-s. (2) it is provided:

> "Justices shall not grant a general order of exemption unless satisfied, after hearing evidence, that it is desirable to do so for the accommodation of any considerable number of persons attending the public market . . ."

The section, therefore, authorises a general order of exemption to be made where the premises adjoin a place where persons follow a lawful trade or calling. No question of that sort arises in this case, and the sole question here is: Is there a public market in the immediate neighbourhood in which the Swan public house is situated, and, if so, was there evidence that a considerable number of persons attended that public market? There is a market place in Bungay and up to twenty-two years ago there was a cattle market there, but since then the only market in the ordinary sense of the word consists of a fruit stall which comes there on Thursdays, which is said to be the market day, and a fish stall owned by Mr. Buck, the applicant himself, which is there every day of the week, I suppose outside the public house. There are other stalls, a toy stall which comes there before Christmas and on two occasions in the year a St. John's Ambulance Brigade stall. It is perfectly clear, and, indeed, as appears from the affidavit of the chairman of the justices, they were quite clearly of opinion, that those few stalls did not constitute a public market in the ordinary sense of the word, and that in any event there was not a considerable number of persons who attended that public market. What, however, they did was to find that there was a public market on grounds probably dating from the days when the cattle market farmers were wont to come into Bungay on Thursday afternoon. Indeed, locally Thursday is still called "market day". The farmers who come in do not frequent these odd stalls, but they go into licensed premises round about the market place and do business with each other. Commercial travellers selling fertilisers and food find it convenient to go to the public houses and seek business from their customers, the farmers, there.

Although advised that they could not do so by their clerk, the justices, by a majority as I understand their affidavit, held that that concourse of farmers and the like in the public houses adjoining the market place doing business with each other itself constituted a public market. In other words, the public market which they found to exist was one which took place in public houses by the concourse of farmers there. One can understand their reluctance not to grant a general exemption in this case. Apparently, ever since the cattle market closed the four public houses in the neighbourhood of the market place had all received general exemption orders, and it was only because Mr. Buck, who was the transferee of the justices' licence, had to apply himself for a general exemption order that this issue arose. It seems to me that the justices were loth to interfere with what I may call the traditional meetings that take place in public houses among the farmers and the commercial travellers. That I can understand, but it is quite clear that a meeting of people in a public house cannot constitute a public market in the ordinary sense of the word. Indeed, when one realises that the licensed premises are to be situated in the immediate neighbourhood of the

public market, it becomes clear that the bar of the public house or the public house itself cannot constitute the public market. There was, in my judgment, no evidence upon which the justices could find that there was a public market, and, accordingly, there was no jurisdiction to make the order, and it must be quashed.

DONOVAN, J.: I agree entirely.

SALMON, J.: I agree.

Order for certiorari.

Solicitors: *Maude & Tunnicliffe*, for *P. F. Rodwell*, Halesworth.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

April 15, 1959

YOUNG *v.* DAY

Road Traffic—Notice of intended prosecution—Place of offence not sufficiently specified—Four-mile stretch of minor road—Road Traffic Act, 1930 (20 *and* 21 *Geo.* 5, *c.* 43), *s.* 21.

A notice of intended prosecution under s. 21 of the Road Traffic Act, 1930, stated that the police were considering prosecuting the defendant for dangerous driving, among other offences, "at 7.40 p.m. on July 6, 1958, at Hothfield to Bethersden Road. It is alleged that while motor car No. MKJ 680 was being driven along the Hothfield to Bethersden Road in the direction of Hothfield the driver drove in such a manner that he narrowly avoided colliding with a motor car which was stationary on the offside of the road". The Hothfield to Bethersden Road was a minor road approximately four miles in length. The justices held that the notice was invalid in that it did not sufficiently specify where the offence was alleged to have been committed and dismissed the information. On appeal by the prosecutor,

HELD: that the police could have specified the place of the alleged offence more accurately and that it was impossible to say that there were no facts on which the justices could come to the conclusion to which they came, and, therefore, the appeal must be dismissed.

CASE STATED by Kent justices.

An information was preferred at Ashford Magistrates' Court by the appellant, Raymond Albert Young, a police officer, charging the respondent, Michael Brian Westbrook Day, with dangerous driving. According to the facts found by the justices, on July 15, 1958, the police sent a notice of intended prosecution to the respondent which stated that they were considering prosecuting him for dangerous driving, among other offences, "at 7.40 p.m. on July 6, 1958, at Hothfield to Bethersden Road. It is alleged that while motor car No. MKJ 680 was being driven along the Hothfield to Bethersden Road in the direction of Hothfield the driver drove in such a manner that he narrowly avoided colliding with a motor car which was stationary on the offside of the road." The respondent was not warned at the time of the alleged offence nor was the summons issued within the next 14 days. The Hothfield to Bethersden Road was a minor road approximately four miles in length. No accident had occurred, nor was the respondent stopped at the time of or after the alleged offence. The justices were of opinion

that the notice was invalid in that it did not sufficiently specify where the offence was alleged to have been committed and dismissed the information. The prosecutor appealed.

Durand, Q.C., and *Edie* for the appellant.
Collard, for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the petty sessional division of Ashford, Kent, before whom an information was preferred against the respondent for dangerous driving. When the matter came to be heard, a preliminary objection was taken that the provisions of s. 21 of the Road Traffic Act, 1930, had not been complied with. There had been no warning of the respondent at the time. No summons was served on him within fourteen days, but undoubtedly on the ninth day a notice of intended prosecution was served, and it was said that the prosecution had failed in that notice sufficiently to specify the place where the alleged incident occurred. The notice itself was in these terms:

> "I hereby give you notice that the driver of motor-car No. MKJ 680 has been reported for consideration of the question of prosecuting him of one or more of the following offences" [then there were set out five offences including dangerous driving] "contrary to ss. 11 and 12 of the Road Traffic Act, 1930, as applied by s. 11 of the Road Traffic Act, 1956. At 7.40 p.m. on July 6, 1958, at Hothfield to Bethersden Road. It is alleged that while motor-car No. MKJ 680 was being driven along the Hothfield to Bethersden Road in the direction of Hothfield the driver drove in such a manner that he narrowly avoided colliding with a motor-car which was stationary on the off side of the road."

That notice was served on the respondent, the owner of the vehicle

The short question here is whether, being obliged, as the police are under the section, to specify the place where it is alleged the offence was committed, they sufficiently complied with the section in describing the place of the offence as on the "Hothfield to Bethersden Road". The justices found that the Hothfield to Bethersden Road was a minor road approximately four miles in length, and they went on to hold that, in their opinion, the preliminary objection was well founded, and accordingly the notice was bad in that the police could have identified the spot in that four-mile stretch where the alleged offence occurred. As was pointed out in *Pope* v. *Clarke* (1), s. 21 is mandatory and provides that a notice of intended prosecution shall be served. So far as the matters which have to appear in that notice are concerned, the court held that they were directory, and that the test whether there had been compliance was whether the information specified was sufficient to bring to the attention of the alleged offender the indident which was going to be relied upon. In that case details of the place had been given and the date had been given, but by a mistake the notice said that it had occurred at 1.15 p.m., whereas in fact the correct time was 11 a.m. In those circumstances, this court held that there could have been no question of the alleged offender being misled or prejudiced in any way, and they held that the notice was a good notice.

It seems to me that in all these cases it is a matter of degree whether the information given is sufficient, and, being a matter of degree, it must be a question of fact in each case. As counsel said in the course of his argument for the appellant, if the four-mile stretch had been along a main London road, it would

(1) 117 J.P. 429; [1953] 2 All E.R. 704.

be quite idle to suggest that the notice was sufficient if it did not specify more clearly the exact place in that stretch of road where the incident was said to have occurred. This, however, was a minor road, as the justices found. They had full knowledge, and on consideration of the matter, they felt that the police could have specified it more accurately. The police certainly had the information and it is obvious that they could have been more specific because, even if they could not specify the place by reference to an intersection, a building, or a church, they could indicate that the alleged offence took place a quarter of a mile from Hothfield or half a mile from Bethersden, or wherever the place was. It seems to me that this was a question of fact for the justices, and it is impossible for this court to say that there was no evidence which would entitle them to come to the conclusion to which they did. In my judgment, they came to the right conclusion, and this appeal must be dismissed.

DONOVAN, J.: I agree. I would merely emphasise that there is a specific finding of fact in this case that the notice did not sufficiently specify the place where the alleged offence occurred. The question is whether as a matter of law the justices were disentitled to come to that finding. They clearly were not. They were entitled to take that view on their knowledge of the locality.

SALMON, J.: I agree. I think that the question whether the place is sufficiently specified in the notice under s. 21 of the Road Traffic Act, 1930, is essentially a question of fact. For example, it clearly would not be enough to specify " Oxford Street " in London. On the other hand, I am far from saying there are not many country lanes where it would be sufficient to identify a place in the way in which it is specified in this notice, but the justices, who presumably know this country district, have come to the conclusion, which is one of fact, that the place was not sufficiently specified, and, in my view, it is impossible for this court to interfere with their finding.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.* for *N. K. Cooper*, Maidstone; *Cripps, Harries, Hall & Co.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, L.J., DONOVAN AND SALMON, JJ.)

April 17, 1959

ROSS *v.* EVANS

Animal—Dog—Suffering unmuzzled ferocious dog to be at large—Lead attached to dog—Physical means of control available, but not exercised—Metropolitan Police Act, 1839 (2 *and* 3 *Vict.*, *c.* 47), *s.* 54 (2).

On Feb. 16, 1958, the appellant was walking in a road with six or seven greyhounds on a master lead with individual leads attached to it when one of the greyhounds sprang at a passer-by and bit him. On March 14, 1958, the appellant was walking in a road with five or six greyhounds, all of which were on leads when one of the greyhounds leapt at a passer-by and bit her. The appellant was convicted of the offence on each occasion of suffering to be at large an unmuzzled ferocious dog, contrary to s. 54 (2) of the Metropolitan Police Act, 1839. On appeal by the appellant.

HELD, that the convictions must be quashed as the dog on neither occasion was "at large" within the meaning of the subsection which applied only to the case where a person had no physical control of a dog at all and not to the case where a person had the physical means of controlling a dog by a lead but did not do so.

CASE STATED by justices for the county of Middlesex.

On June 20, 1958, two informations were preferred by the respondent Evans, a police officer, against the appellant, Victor Ross, charging him, in each case, with an offence against s. 54 (2) of the Metropolitan Police Act, 1839, in that (on Feb. 16, 1958, in one case, and on Mar. 14, 1958, in the other case) he had suffered to be at large an unmuzzled, ferocious dog, contrary to the subsection. The informations were heard at Harrow Magistrates' Court on Nov. 4, 1958, when the following facts were found. On Feb. 16, 1958, the appellant was walking in Chapel Hill, Harrow Weald, with six or seven greyhounds on a master lead with individual leads attached to it. One of the greyhounds sprang upon a Mr. R. Mortimer who was walking in Chapel Hill, made a small bite on his left arm, and tore his coat. On Mar. 14, 1958, the appellant was walking in Brookshill, Harrow Weald, with five or six greyhounds. They were all on leads. One of the greyhounds leapt and bit a Mrs. M. Mahoney on her left arm, tearing her coat and causing a wound necessitating hospital treatment including a skin-grafting operation and leaving a scar. The appellant did not try to control the dog. The appellant contended that there was no case to answer. The respondent contended that the offences had been proved. The justices were of opinion that a dog being on a lead and in the circumstances therein proved was a dog "at large", within the meaning of s. 54 (2) of the Act of 1839, and, accordingly, they found the appellant Guilty on both summonses. They imposed a fine of 40s. on each summons and ordered the appellant to pay £33 14s. costs. The appellant appealed.

S. M. Stewart for the appellant.
Pownall for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the Petty Sessional Division of Gore, sitting at Harrow Magistrates' Court, before whom the appellant was charged with two offences contrary to s. 54 (2) of the Metropolitan Police Act, 1839, in that he suffered to be at large an unmuzzled, ferocious dog. The justices found the offences proved and imposed a fine of 40s. on each summons and ordered the appellant to pay costs.

[His Lordship summarised the facts and continued:] The sole question, a short one and a novel one, is whether in each of those cases the dog concerned was "at large" within the meaning of s. 54 (2) of the Act of 1839. The Act concerned is "An Act for further improving the police in and near the Metropolis", and s. 54 reads:

> "... Every person shall be liable to a penalty ... who ... shall in any thoroughfare or public place, commit any of the following offences; (that is to say,) ... 2. Every person who shall turn loose any horse or cattle, or suffer to be at large any unmuzzled ferocious dog, or set on or urge any dog or other animal to attack, worry, or put in fear any person, horse, or other animal."

The justices in this case clearly, I think, came to the conclusion that, although a person might have control of a dog by some physical means such as a lead, yet if he did not control the dog, the dog was at large. They say—with regard, it is true, to only one of the offences charged, but I understand that the facts were the same in each case—that the dogs were all on leads, and that "The appellant did not try to control the dog", that is, the dog that jumped up and bit the passer-by. For my part I am quite satisfied that an offence is not committed under s. 54 (2) where a person has the physical means of controlling the dog but does not do so. I think that the sub-section is aimed at the case where a person has no physical control of the dog at all. The case was put in argument of a person who had a dog on a lead so long that he could not exercise any physical control. It may well be that in such a case it could be said that the control was so minimal that the dog was to all intents and purposes a dog at large. However, that is not the present case. This is a case where a man could exercise control over the dog by means of the lead, but did not do so. In my judgment, the justices were wrong in convicting the appellant on these two charges, and the appeal must be allowed.

DONOVAN, J.: I should be glad, if I could, to take the same view as the justices took of the meaning of the expression "suffer to be at large any unmuzzled ferocious dog" where it occurs in s. 54 (2) of the Metropolitan Police Act, 1839. One has little sympathy with anyone exercising on the public highway six or seven greyhounds controlled only by a lead of such a design that the dog cannot, it seems, be effectively prevented from biting passers-by. The question here, however, is purely one of construction of the section. The respondent relies on the expression "turn loose any horse or cattle" in the same sub-section, as contrasted with the words "suffer to be at large" used in relation to a dog, and he says that this shows that the legislature contemplated that a dog could be at large, although not turned loose. The expression "to turn loose", however, is one commonly used to describe horses or cattle which are set free; but, where dogs are concerned, the same idea is commonly expressed by the term "suffer to be at large". Of more weight, I think, is the inference to be drawn from s. 54 (4), which reads:

> "Every person having the care of any cart or carriage who shall ride on any part thereof, on the shafts, or on any horse or other animal drawing the same, without having and holding the reins, or who shall be at such a distance from such cart or carriage as not to have the complete control over every horse or other animal drawing the same."

If the legislature intended s. 54 (2) to apply to a dog on a lead giving less than complete control over it, I think that similar language could have been used. My Lord has said that it may be that, if a dog were on a lead which was so

extravagantly long that the dog was for practical purposes just as free to be a nuisance on the highway as if it were loose, the dog could be said to be "at large" within the meaning of the sub-section. There is no evidence of that here. All the court knows is that, in the first episode, there was a master lead with small leads from it, and that, in the second, all the dogs were on leads and the appellant did not try to control the offending dog. That implies that he could have controlled it and that the lead was of such a kind that would have enabled him to do so. Accordingly, when the respondent urges that this is a question of fact, I think that the answer must be that there was no evidence to justify the conclusion that the leads were so extravagantly long or so hopelessly inadequate as to leave the dog, for the purposes of being a nuisance, practically at large. That being the case, I do not feel it possible to say that a dog on a lead or leads such as are described in the Case is "at large" within the meaning of s. 54 (2), and I agree, therefore, that the appeal must be allowed. I hope that there is some bye-law which can be invoked in this district to stop a repetition of these incidents.

SALMON, J.: I agree, and have nothing to add.

Appeal allowed.

Solicitors: *Darracotts; Solicitor, Metropolitan Police.*

T.R.F.B.

COURT OF APPEAL

(LORD EVERSHED, M.R., ROMER AND PEARCE, L.JJ.)

March 16, 17, 18, 19, April 27, 1959

FAWCETT PROPERTIES, LTD. *v.* BUCKINGHAM COUNTY COUNCIL

Town and Country Planning—Development—Condition—Permission to erect farmworkers' cottages—Occupation of cottages limited to persons defined by nature of employment, including their dependants—Town and Country Planning Act, 1947 (10 *and* 11 *Geo.* 6, *c.* 51), *s.* 14 (1), *s.* 36.

A local planning authority gave permission to erect a pair of farm workers' cottages subject to the condition that the "occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent on agriculture, and including also the dependants of such persons as aforesaid." The reason for imposing that condition was stated to be "that the council were not prepared to permit the erection of dwelling-houses on this site unconnected with the use of the adjoining land for agriculture or similar purposes." At the date of the permission there was no development plan relating to the area in operation, but its inclusion in a green belt area was envisaged.

HELD: the condition, on a fair construction, fairly and reasonably related to the development plan and planning proposals of the local planning authority as required by s. 14 (1) and s. 36 of the Act of 1947; it was not void for uncertainty; and, therefore it was intra vires and valid.

APPEAL by the defendants, Buckingham County Council, from an order of ROXBURGH, J., reported 123 J.P. 54.

Widgery, Q.C., and *Alan Fletcher* for the defendants, Buckingham County Council.

Megarry, Q.C., and *Fletcher-Cooke, Q.C.*, for the plaintiffs.

Cur. adv. vult.

Apr. 27. The following judgments were read.

LORD EVERSHED, M.R.: In this case the validity is impugned by Fawcett Properties, Ltd. (respondents in this court) of a condition imposed by the appellants, Buckingham County Council, as the relevant planning authority under the Town and Country Planning Act, 1947, on the grant of permission to one Clark, the company's predecessor in title, to build two farm workers' cottages at Chalfont St. Giles. Mr. Clark first applied for such permission in May, 1952, and it was granted, on condition, in the following July. Owing to certain difficulties in siting the cottages, Mr. Clark's proposal and the permission given for it had to be abandoned, and a slightly different planning proposal was made by him in November, 1952. Permission to erect the farm workers' cottages according to this second proposal was granted, on condition, on Dec. 5, 1952, by the clerk to the Amersham Rural District Council for and on behalf of the county council. We are only concerned with the terms of the document recording this permission on Dec. 5, 1952. In certain (though immaterial) respects it differed from the earlier document of July; but the condition with which we are concerned appeared in fact in both documents in identical language, and I will read it. It is as follows:

> "The occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid."

In accordance with an order promulgated by the Ministry of Town and Country Planning, the document granting the permission of Dec. 5, 1952, also contained a statement of "the reasons for imposing" the condition which was as follows:

> "because the council would not be prepared to permit the erection of dwelling-houses on this site unconnected with the use of the adjoining land for agricultural or similar purposes."

Mr. Clark proceeded to erect the two cottages and no question arose in regard to them or in regard to the terms or efficacy of the condition between Mr. Clark and the council. But the company, having succeeded to the interest of Mr. Clark, have contended and now contend that the condition is wholly ineffective on the grounds that it was, according to its terms, beyond the competence of the council to impose in accordance with the provisions of the Town and Country Planning Act, 1947, or that it is void for uncertainty, or that, on its proper interpretation, its force is now exhausted.

As is well known, the effect of the Town and Country Planning Act, 1947, was to place all land in England under planning control so that (so far as is relevant to this case) no vacant land could be "developed" by being built on save with the permission of the local planning authority (in this case the council), which permission might be granted either unconditionally or subject to conditions. Thus it is that s. 14 (1) of the Act provided so far as material:

> "... where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations."

There was in this case at the relevant date no operative "development plan" for the area in question. It follows, therefore, that the obligation of the council

under the section was to have regard "to any other material consideration", and it is not in doubt that the effect in the present case of these five words which I have quoted was to introduce and make obligatory for the council's consideration (there having been no direction by the Minister) the matters indicated by the final words of s. 36 of the Act, viz.:

> "... the provisions which in their opinion will be required to be so included [in the development plan when operative] for securing the proper planning of the said area."

At the relevant date there had been published by the council what is called an "Outline Development Plan for Buckinghamshire". The most relevant paragraph of this document is set out in the judgment of ROMER, L.J., which I have had the advantage of seeing; and I do not repeat it. It is sufficient for the purpose of my judgment (for there is no dispute on the matter between counsel) to say that the area of Chalfont St. Giles, which includes the land in question, was and is intended to form part of what is generally known as London's green belt, and as such to be dedicated to rural use and excluded accordingly from any form of urban development. The "reason" given in the planning document of Dec. 5, 1952, is conceded to reflect by its language that purpose: and it is also conceded, as I have already indicated, and as I later repeat, that by the joint effect of s. 14 and s. 36 of the Act it was the council's duty in considering Mr. Clark's application for planning permission to have regard to the provision which would in their opinion be required for achieving that purpose.

I take first the more broad and general attack by counsel for the company on the validity of the condition, viz., that in spite of the generality of the language of s. 14 (1) of the Act, "... such conditions as they think fit", it is not open to the local planning authority to impose a condition in reference to a proposed structure related not to the manner in which the building may be used (e.g., as a residence, or as a shop, etc.) but to the class of persons who may use or occupy it. On this point I am content to adopt the conclusion and reasoning of ROXBURGH, J., who stated that acceptance of such an argument would involve reading some gloss or qualification into the language chosen by Parliament and that he could find no sufficient justification for doing so. The learned judge observed (and I respectfully agree with him) that the examples given in s. 14 (2) are expressed to be without prejudice to the generality of the preceding subsection, and cannot, therefore, properly be invoked for the very purpose of limiting that generality. I add that, in my judgment, the fact that the terms of s. 12 of the Act in general provide that a material change in the user of premises will constitute development lends support to the interpretation of the general language of s. 14 (1) according to its natural sense.

Though I am taking the point out of its order, I can also deal here, and briefly, with the last submission of counsel for the company, viz., that on its true construction the condition only purported to apply by way of restriction to the first occupation of the cottages, so that its force must now be taken as spent. Counsel did not develop the argument at any length, and he will, therefore, I hope, forgive me if I reject it somewhat summarily. It is sufficient, in my view, to say that I do not think the language of the condition can fairly be so construed, and that no planning authority could sensibly in a case of this kind be supposed to be discharging its statutory duty by imposing a condition so restricted.

To my mind the most difficult question is whether, when regard is had, on the one hand, to the planning scheme and proposals of the council, and the reasons given by the council for the imposition of the condition in December, 1952, and, on the other hand, to the scope and effect of the condition itself according

to a fair interpretation of the language, the latter ought to be treated as having been beyond the council's powers, not being fairly and reasonably related to the former. In formulating the question, I have, as a matter of language, substituted (by reference) the words "the planning scheme and proposals of the council" for the words used by ROXBURGH, J., "the local planning requirements". Both forms of words depart somewhat from the language of LORD DENNING in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (1), where he spoke of the requirement that the conditions should "fairly and reasonably relate to the permitted development". The test proper to be applied, however it be expressed, is derived from the last four lines of s. 14 (1) of the Act as they are qualified in the present case by the terms of s. 36 of the Act. The joint effect of these provisions being (so far as relevant to the present case) that in dealing with Mr. Clark's application to build the two "farm workers' cottages" the council were bound to have regard to the provisions which, in their opinion, would be required to be included in the then contemplated development plan in respect of this area for securing its proper planning. It seemed at one time that a question might be raised whether it was the duty of the council to assume the burden of proving positively what were the matters to which in fact they had had regard. But counsel for the company has in this respect eased our burden, for he has conceded that (prima facie, at any rate) it is not necessary that the council should prove these matters affirmatively. He concedes that they should be assumed to have had regard to the proper factors unless the objector to the condition can produce evidence to the contrary (as has not been done in this case) or unless the facts of the case, and particularly the terms of the condition itself, lead as a matter of necessary or proper inference to a contrary result.

So far there is no conflict (in principle at any rate) between counsel, but what is said by counsel for the company (and what was, I think, found by the learned judge) was to this effect—that since the contemplated development plan for the relevant area involved its use and preservation as a rural (i.e., an agricultural) area, then the provisions which would have to be included in such a plan and to which, therefore, the council must have regard, must be provisions designed to achieve that end; and that the terms of the condition, fairly construed, were in truth inconsistent with such provisions or requirements. Without, therefore, contending (as I understood him) that the court ought necessarily here to infer failure on the part of the council to have regard to the proper requirements of the intended plan, counsel submitted, in reliance on LORD DENNING'S language that the terms of the condition bore no fair or reasonable relation to the intended plan, and, therefore, that the condition must be treated, according to LORD DENNING, as "invalid". Put another way counsel said that if it be shown that the terms of the condition bear no fair or reasonable relation to the intended plan, then, whatever the council did or intended to do or even thought that they did, they have or must be taken to have lost sight in framing their condition of the matters which were relevant for their consideration; and the result is, therefore, the same as if they had not properly ever considered such matters at all.

On the other side, counsel for the council, while not seeking to qualify the true effect of LORD DENNING'S language, invoked also the terms of LORD GREENE, M.R.'s, judgment in *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.* (2) as showing that in such circumstances as the present, if the local

(1) 122 J.P. 182; [1958] 1 All E.R. 625; [1958] 1 Q.B. 554.
(2) 112 J.P. 55; [1947] 2 All E.R. 680; [1948] 1 K.B. 223.

authority has not misdirected itself by paying regard to the wrong matters, then the matter of reasonableness is, prima facie, at any rate, one for the local authority's discretion, and that, in regard to such discretion, the court will not act in an appellate capacity, substituting its own opinion for that of the local authority.

Since it is at this point that the arguments of counsel part company, I hope that I shall be forgiven for substantial citations from LORD GREENE, M.R. He said in the *Wednesbury* case (1):

> " What, then, is the power of the courts ? The courts can only interfere with an act of an executive authority if it be shown that the authority have contravened the law. It is for those who assert that the local authority have contravened the law to establish that proposition. On the face of it, a condition of this kind is perfectly lawful. It is not to be assumed prima facie that responsible bodies like local authorities will exceed their powers, and the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for the local authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law.
>
> " What, then, are those principles ? They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty—those, of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration."

Again, in reference to the judgment of ATKIN, J., in *Theatre de Luxe* (*Halifax*), *Ltd.* v. *Gledhill* (2), LORD GREENE, M.R., said:

> " . . . I think that ATKIN, J., was right in considering that the restrictions on the power of imposing conditions were nothing like so broad as the majority thought, but I am not sure that his language might not be read in rather a different sense from that which I think he must have intended. I do not find in any of the language that he used any justification for thinking that it is for the court to decide the question of reasonableness rather than the local authority. I do not read him as in any way dissenting from the view which I have ventured to express, that the task of the court is not to decide what it thinks is reasonable, but to decide whether the condition imposed by the local authority is one which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose."

(1) 112 J.P. 55; [1947] 2 All E.R. 680; [1948] 1 K.B. 223.
(2) 79 J.P. 238; [1915] 2 K.B. 49.

In my judgment it follows from the citations which I have made that if the condition in the present case is to be held "invalid" (i.e., beyond the competence of the council to impose) it must be shown that its terms, on the face of them, are demonstrably unrelated to the proposed plan. So that the result is the same as if the council had never had the proposed plan and its requirements really or properly in its mind at all. In other words, it is not, in my judgment, enough that the terms are not such as, in the opinion of the court, are best designed to subserve or promote the intended plan; or that, while capable of subserving or promoting the plan, they do so inefficiently and are or may be also capable, in practice, of creating anomalous situations and permitting occupation of the cottages by persons who have no concern with the intended agricultural use of the adjoining property.

The main criticism of the condition has been in two directions: first, that there is no limitation (as regards either the permitted occupants or as to the agricultural or industrial enterprises covered by the terms of the condition) to the adjoining district; and, secondly, that the phrase "any industry mainly dependent on agriculture" covers a type of enterprise not only vague and extremely wide in its scope, but also unrelated to the (supposed) rural requirements of the neighbourhood.

These objections are formidable. But after much consideration and, indeed, some vacillation of opinion, I have come to the conclusion that in the light of LORD GREENE, M.R.'s exposition they are not sufficient to "invalidate" the condition. It is to be remembered (i) that the subject-matter to which the condition relates is two small "farm workers' cottages" in a rural area, and (ii) that the condition is intended to persist for an indefinite period of time. In these circumstances it seems to me as a practical matter that in the foreseeable future and, at any rate, in at least nine cases out of ten, the effect of the condition is to limit the use of the cottages to the occupancy of persons who have a direct interest as workers in the agricultural requirements of the area; and that, although the language of the condition would allow to qualify for occupation other persons who would have no such concern, e.g. (to cite extreme instances used in the course of the argument) an ex-employee of a sheep farm in New South Wales or the servant of a canning factory in a neighbouring county, the result is only to show that the council have not limited the class of occupancy in the most strict or efficient way or in the way they might have done had they had the advantage before drafting the condition of hearing the arguments in this court. In other words, I have in the end come to the conclusion both (a) that the terms of the condition do not suffice to show that the council failed, or must be deemed to have failed, to have regard to the matters which, by the terms of the statute, they should have regarded, and (affirmatively) (b) that the terms of the condition are fairly and also reasonably (in the sense of intelligibly and sensibly, if not most economically and efficiently) related to the council's planning scheme and proposals.

It will be seen that I have used, throughout, the phrase "planning scheme and proposals" as being, in my view, most appropriate to the circumstances; but I do not intend any difference from ROXBURGH, J.'s phrase "local planning requirements", and I also agree with ROXBURGH, J., in thinking that LORD DENNING had no different intent by his words "the permitted development" which could in strict use of language mean, in the present case, only the two cottages themselves. But LORD DENNING was not intending to lay down a precise and governing formula for all cases of this kind, nor had he in mind or under consideration the problem which is raised in this case. I also disclaim, for my part, an intention to lay down some precise and governing formula; but I

have ventured, in the light of LORD GREENE, M.R.'s judgment in the *Wednesbury* case (1), to interpret LORD DENNING'S words "fairly and reasonably" as meaning "intelligibly and sensibly", and not as indicating that the court must approve the conditions as being a "fair and reasonable" exercise of the planning authority's discretion, judging, that is, of the fairness and reasonableness and so inevitably to some degree at least acting in an appellate capacity in regard to the authority's discretion.

It was the view of ROXBURGH, J., that since by the terms of the condition no preference was given to local agricultural workers over, say, employees of more distant canning factories, therefore the condition failed "fairly and reasonably" to relate to the proposed local plan; in other words, that the condition, to attain the required standard, should have provided that the class of permitted occupants other than purely local farm workers should only be entitled to live in the cottages if there were no strictly local applicants. Again, it was the view of the learned judge that the inclusion of industries mainly dependent on agriculture could not (possibly) be relevant to the intended local plan; and in considering the implication of the word "fair" he was of opinion that the local authority must be "fair" to all classes of the community which they represent. These matters are beyond question weighty criticisms of the efficiency of the condition in its relation to the proposed plan, though, as regards the last point, I feel some doubt of the way in which the condition may be said to have failed (relevantly) in fairness to the general community. But for reasons which I have already tried to state, I have in the end come to the conclusion that these criticisms, being qualitative in character, do not suffice to disable the condition altogether, though I share my brethren's hope that its future use will be at the least carefully considered. Thus, if it is legitimate, e.g., to consider whether the condition should have given priority to purely local farm workers, there seems to me to be logically no stopping short of reviewing the local authority's discretion in all its aspects, and rejecting the condition altogether if, in the end, it fell short of what the court would itself acting fairly and reasonably in relation to the plan have contrived.

There remains the attack of counsel for the company on the condition on the ground that its language is void for uncertainty. What, asked counsel, is the significance and effect of the word "occupation"? Is it intended to refer to occupation as of some right, i.e., as tenant or licensee? Or does it extend to any person who for any reason and at any time happens to reside in the houses? Again, who are intended to be covered by the term "dependants"? Is financial dependence intended? And, if so, must such persons be in fact financially dependent and how at any given moment of time can such facts be ascertained? More difficult still, what is the scope and effect of the phrase "industry mainly dependent upon agriculture", and is it relevant in what capacity the "occupier" is employed by such an industry? Finally, counsel observed that, prima facie, the condition might be broken as a result of some fact (e.g., change in the nature of the employment) occurring after the "occupation" had been first entered into. It is undeniable that these criticisms have much force. But on the whole I conclude that on this point also (on which it was, in the circumstances, unnecessary for the learned judge to reach a decision) the company should not succeed. It is not difficult in the case of any general formula to suggest or imagine instances in which a difficulty might arise in saying whether the instance would or would not be within the formula; but it does not follow as a consequence that the formula should in vacuo, as it were, and in advance be held void. It has to be remembered

(1) 112 J.P. 55; [1947] 2 All E.R. 680; [1948] 1 K.B. 223.

that the present condition is related to two small farm workers' cottages. In that context I cannot think that any real difficulty arises, or would be likely to arise, in saying whether any " occupation " was within the condition or (as indeed ROXBURGH, J., thought) in saying what was meant by " dependants ". It is no doubt true that a subsequent change of employment might take an " occupancy " outside the permission allowed by the condition, though within it at the occupancy's commencement; but these considerations are pertinent, as I think, rather to the argument on ultra vires than to that on construction. The expression " industry mainly dependent upon agriculture " is indeed very vague and wide. But the real question is whether, if any question arose in the future, was a proposed occupant or was he not employed in such an industry, the parties or the court would be unable to give a certain answer. I am not persuaded that they could not. The learned judge took the view that the inclusion of this phrase would presently or in the future involve an " extensive and expensive inquiry " to find out what industries were comprehended. With all respect to him, I do not think that this is so. In no circumstances and at no time would it, so far as I can see, be necessary to discover and make, as it were, a list of all the industries included by the phrase.

It was contended that since this condition was promulgated by a local authority in exercise of its statutory power, it was fairly analogous to a bye-law, more particularly since penal consequences might ensue from its breach. It is true that the courts have on more than one occasion expressed the view that bye-laws should be clear and certain in effect (see 24 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 517, para. 951 and cases there cited), though there is also authority for the view that the courts will not be astute to hold bye-laws void and of no effect on the ground of obscurity (see *Kruse* v. *Johnson* (1), per LORD RUSSELL OF KILLOWEN, C.J.). In my judgment, however, the analogy between the present condition and a bye-law is not a true one. A bye-law is a local, but within the locality, a general, regulation; this condition was an expression of the terms on which the council informed Mr. Clark that they were prepared to grant to him permission to build his cottages, and the terms were at least satisfactory to him, for he built the cottages and no difficulty arose during his ownership in giving effect to the condition. Further, though penal consequences may follow on a breach of the condition, they do so, as it were, at a remove. The first step which the local authority must take if they allege a breach of the condition is to serve an enforcement notice; and that notice may be challenged by the landowner or the tenant (as the case may be) before the local justices. It is only after the service of the notice and (if it has been challenged) the failure of the challenge that the local authority may invoke the penal provisions of the Act. These provisions seem to me to provide reasonable protection, at any rate, to the landowner in a case in which, because of difficulty or obscurity in the language of the condition, there is doubt whether the acts complained of constitute a breach.

There is another consideration which has appreciably affected my mind on this matter. The language of the condition has been taken, so far as relevant, ipsis verbis, from the definition of the phrase " agricultural population " in s. 34 (2) of the Housing Act, 1930, now s. 115 (2) of the Housing Act, 1936. It is no doubt true that we are asked to construe a condition in the permit issued by the council in December, 1952, and not a section of the Housing Act. It may also be true that a collection of words can be reasonably clear in one context and obscure to the point of voidness in another; and it may further

(1) 62 J.P. 460; [1898] 2 Q.B. 91.

be that the administrative difficulties capable of arising from the formula in the Housing Acts (which are, so far as relevant, concerned with the grant of an annual subsidy in respect of premises occupied by a member of the "agricultural population", as above defined) are less than those which may emerge from a user of the formula in a condition imposed under the Town and Country Planning Act, 1947. Nevertheless, it seems to be inescapable that, if the arguments of counsel for the company that the language in the condition to which I have referred is void for uncertainty in the context of the condition, it is no less void for uncertainty in the context of the Housing Acts. I do not, of course, say that forms of words occurring in an Act of Parliament are, because they so occur, sacrosanct against being held void for obscurity and uncertainty; but the court will, in my opinion, be slow to come to such a conclusion on words which have been on the statute book for more than a quarter of a century and have, during that time, doubtless been many times acted on. For the reasons which I have tried to state, I come therefore to the conclusion that we ought not to hold the condition in the present case void for uncertainty.

It follows, in my opinion, that all the challenges made on the efficacy and validity of the condition should be rejected and that the appeal should be allowed accordingly.

ROMER, L.J.: The ground on which the learned judge based his declaration that the condition subject to which the council gave their approval under the Town and Country Planning Act, 1947, for the erection of the two cottages with which these proceedings are concerned was ultra vires and of no effect was, in substance, that the condition did not effectuate any proper planning purpose. The validity of the condition was impeached in the court below, as it was before us, on other grounds as well, but I will consider first the one which I have already mentioned.

At the date when the council gave their permission for the building of the cottages, viz., Dec. 5, 1952, no development plan had become operative with respect to the Chalfont St. Giles area of the council. An Outline Development Plan for Buckinghamshire had, however, been drafted in February, 1950, and a copy of it was put in evidence. It is stated on p. 1 of this document that the Outline must be regarded as a draft only, but that it did "enunciate the fundamental matters which must be considered in forming the framework of the statutory plan". On p. 12 and p. 13 of the Outline there appears the following reference to the Metropolitan green belt:

> "Although much of the land included in the Metropolitan green belt ring of the Greater London Plan is not necessarily of great scenic beauty or highly productive from the agricultural point of view it is essential that it should be preserved against building development so as to form a barrier against the further outward spread of London . . . The communities in Bucks within the green belt are . . . Chalfont St. Giles . . . It is proposed that further development of these communities should be restricted to infilling and rounding off of existing development."

The policy which emerges from this statement was still current in December, 1952, and, as no relevant directions had been given by the Minister, the council had, in granting development permission in the Chalfont St. Giles area, to have regard to the Outline Development Plan (s. 36 of the Act) and to "any other material considerations" (s. 14). There can be no doubt but that the policy which I have quoted from the Outline Development Plan constituted a proper planning purpose or that conditions calculated to further that purpose could properly be attached to permission to develop in the area in question. Before

considering the effect of the condition which the council did in fact attach, and which has resulted in this litigation, it is necessary to note the reason which the council gave for imposing it:

> "Because the council would not be prepared to permit the erection of dwelling-houses on this site unconnected with the use of the adjoining land for agriculture or similar purposes."

The meaning of this reason would appear to be that the council would only allow houses to be built on the site provided that their use, when erected, would be connected with the agricultural use of the adjoining land. The reason, so interpreted, is in conformity with the policy stated in the Outline Development Plan and would seem to show that the council, in framing it, were aware of the obligation imposed on them by s. 36 of the Act. The company contend, however, that the same cannot be said of the condition itself which, in their submission, did not implement either the planning policy as adumbrated in the Outline Development Plan, or any other proper planning policy, and was in any event at variance with the reason given for imposing it. I will not repeat the terms of the condition for they have already been stated in the judgment of LORD EVERSHED, M.R. They are clearly open to criticism in more than one important respect. But a preliminary question which, as it seems to me, has to be considered is whether a condition which is attached to a permission to build enjoys the same degree of protection from review by the courts as is enjoyed by planning policies. That protection or immunity has been recognised in several decisions and the principle underlying it has never, perhaps, been more clearly stated than in *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.* (1), which has been fully discussed and analysed by LORD EVERSHED, M.R. The effect of that and other decisions is that if there were any doubt as to the validity of the policy which I have extracted from the Outline Development Plan (which, in my judgment, there is not) the courts would only intervene if satisfied that the council must have taken irrelevant matters into consideration or failed to pay regard to matters which were relevant. Now, conditions attached to development permission do not strictly constitute planning policy; they are rather means of effectuating a policy already pre-determined. I think nevertheless that they are entitled, equally with the policy which they are designed to implement, to the shelter of what I might call the *Wednesbury* umbrella (1). The reasons for giving that shelter to decisions on policy are, in my opinion, equally applicable to the machinery which is essential for rendering those decisions effectual. Accordingly, conditions such as that now in question will not be invalidated on grounds of ultra vires, in my judgment, except on the contingencies indicated in the *Wednesbury* line (1) of authority.

The company's principal contention, in brief, is that the terms of the condition, whether taken by themselves or in conjunction with their probable or reasonably possible consequences, show that the council must have paid regard to irrelevant considerations or failed to take relevant elements into account. They rely on the discrepancy between the condition and the planning policy as outlined in the Outline Development Plan and also on the disparity between the condition itself and the reason which the council gave for its imposition. Taking these two objections in order, the company's first attack is based on the scope of the condition which, says counsel on their behalf, is unrelated to the Outline policy, or to any other sensible planning policy. Subject to his other submission on ultra vires, counsel for the company concedes that parts of the condition, if

(1) 112 J.P. 55; [1947] 2 All E.R. 680; [1948] 1 K.B. 223.

isolated from the rest, would constitute a perfectly proper condition to be attached by the council when permitting the erection of the cottages. Thus if the condition had been that

> " the occupation of the houses shall be limited to persons whose employment is employment in agriculture as defined by s. 119 (1) "

of the Act of 1947 counsel admits that the objection now under consideration could not be advanced. The condition is, however, not so limited and the company submit that the excess is destructive of the whole. A small excess, they say, if trifling enough to attract the maxim de minimis, would be innocuous, but the condition as framed lets in so many people as authorised occupants of the cottages who might have no connexion with agriculture at all as to show that the council demonstrably lost sight of their obligations as the planning authority when they drafted it. In this connexion the company rely in part on the phrases " or was employment in agriculture " and " including also the dependants of such persons as aforesaid ", but their main attack is on the reference to " an industry mainly dependent on agriculture ". Apart from the uncertainty as to what this expression means the company suggest that the owners of the cottages could let them to industrial workers whose job was some miles away in preference to local agricultural labourers who needed a home which was close to their work. Many other illustrations were also given in argument showing that a large category of persons could qualify as tenants whose occupation of the cottages would bear no relation to any sensible planning policy and certainly not to the policy outlined in the Outline Development Plan. Counsel for the council frankly admitted that curious and anomalous positions might arise under the terms of the condition and that certain persons whose connexion with agriculture was non-existent or remote might qualify as tenants whilst other persons, who might ordinarily be expected to qualify, would find themselves excluded. But he contended that the condition makes a broad division between persons whose employment is such that they may have to live in a rural area and persons whose employment is such that they need not, i.e., a distinction is in effect drawn between the agricultural population and others; that the effect of the condition is to exclude such persons as industrial or office workers who might otherwise have come into the area; that it therefore makes a sensible contribution to the retention of the rural character of that part of the county; and that it accordingly is in substantial and reasonable conformity with the policy contained in the Outline Development Plan, and none the less because of the admitted possible anomalies. The condition, said counsel for the council, is right in principle and imperfection of detail affords no sufficient ground for invalidating it or indeed, on the authorities, for its review by the court at all. I think on the whole, that the council's contention should be accepted. Although the condition is most unfortunately worded and absurd results could follow having regard to its terms, it does seem to me that broadly speaking it is in line with the Outline Development Plan. It is not possible to say that the condition *could* not implement the policy outlined in that document; on the contrary it seems to me that it almost certainly will implement it, notwithstanding that it is dissociated from the policy in certain of its aspects. Assuming, as I do, that the condition is entitled to the same limited immunity from criticism and review as the council's planning policy itself, the company have not satisfied me that the council must, in imposing it, have regarded the irrelevant or disregarded the relevant and thus laid themselves open to challenge.

The company further contend, as already mentioned, that the condition in no way reflects the reason which the council gave for imposing it. The point

and force of the criticism is that by the " reason " the council evinced an intention that the use of the cottages should be connected with the stated use of the adjoining land whereas the condition itself imposes no topographical limitation on the class or work of permitted occupiers. That this disparity between the condition and the reason exists cannot be denied. On the footing, however, which I accept, that the condition is broadly in line with the council's general planning policy it cannot, in my judgment, be invalidated because of some inconsistency with a reason which, as I have earlier indicated, is also in line with the policy. Moreover as a matter of practical common sense it is probable in the highest degree that, if the condition is sustained, these two " farm workers' cottages " will in fact be tenanted by agricultural workers who are employed on the adjoining land.

Turning now to counsel for the company's main submission on the ultra vires issue, this is clearly stated in the company's notice on this appeal in the following terms:

> " It was not within the powers of a planning authority to prescribe conditions limiting the occupation of a new building with reference to the personality of the occupier, but only with reference to the nature of the user thereof."

The submission is that a planning authority cannot specify the persons who may live in a house, but only the purposes for which it is to be used. This appears to put a limitation on the power of the local authority which does not appear in s. 14 of the Act of 1947 or in any other of its provisions to which our attention was called. It is not a very easy point to follow. The argument apparently concedes that the council in the present case could have made it a condition that the two cottages should only be used for the purpose of housing agricultural workers and it is not easy to appreciate any significant difference between that condition and a condition that the occupation of the cottages should be limited to persons employed in agriculture. However that may be, counsel for the company was constrained to admit that this fetter which he sought to place on a planning authority's power to impose conditions might be removed in certain cases. For example, I understood him to concede that a condition limiting occupation to workers on a neighbouring farm would be valid. It seems to me that such a condition would clearly be intra vires of the authority; as also would be a condition limiting the occupation of proposed new dwellings near a colliery to persons employed in it. Exceptions such as these (and many more were suggested in argument) afford, as it seems to me, compelling reasons for rejecting a restriction for which, in my judgment, no sufficient warrant is to be found in the Act itself.

It remains to consider whether the condition imposed by the council is void for uncertainty and this question has caused me considerable doubt. All the members of this court in *Crisp from the Fens* v. *Rutland County Council* (1) stressed the importance of conditions such as those under consideration being clearly expressed, and indeed they were clearly right in doing so. A man's right to do what he likes with his own property has, of course, long since been abrogated in what the State conceives to be the interests of the community as a whole. If, however, a man is subjected to restrictions on the use of property which is his, and for which he has paid, it is at least reasonable that he should know with some precision what those restrictions are. If the condition which the council imposed on Mr. Clark had been (for some other purpose) enshrined in a bye-law, the breach of which would have involved

(1) (1950), 114 J.P. 105.

him or anybody else in criminal proceedings, I should imagine it highly probable that the bye-law would have been held invalid on the ground of uncertainty: *Scott* v. *Pilliner* (1). The main reason why I take that view is the difficulty, which might frequently arise, of knowing whether an industry is or is not mainly dependent on agriculture; or, in the case of an industry which is so dependent, whether and when it ceases to be so if it subsequently, and perhaps gradually, changes its activities. However, the condition is not a bye-law and an enforcement notice for its breach is not a criminal proceeding. Under s. 23 and s. 24 of the Act of 1947 the council could serve an enforcement notice on the owners and occupiers of the cottages if the condition were broken and if this were disregarded penal consequences might ensue for the occupiers, but not for the owners unless they were shown to have caused or permitted the continued non-observance of the condition. Nevertheless owners whose properties are subjected to such conditions as that imposed on Mr. Clark can have no clear idea what will be regarded as a breach of the condition and what will not; and this would in many, and possibly most, cases lead to difficulties in selling or letting the property, with a consequential depreciation in its value, trouble between landlord and tenant and considerable inconvenience to both. It is, in my judgment, quite wrong that a condition couched in such vague and ambiguous terms should be imposed by any planning authority, and I can only hope that it will never be imposed again. I feel there are two difficulties, however, in holding that the condition is invalid for uncertainty. In the first place its language, so far as relevant, is statutory in the sense that it was used in the Housing Acts of 1930 and 1936. That fact in itself would not operate as a deterrent to invalidating the condition on the ground that no sensible meaning could be attributed to it in some of its aspects. What, however, weighs with me is that it was not suggested before us that any difficulty or disputes have arisen from the language used in the Acts of 1930 and 1936; from which it is a legitimate inference that the statutory provisions in question have not worked unsatisfactorily in practice. Counsel for the company pointed out that those provisions in the Housing Acts appear in a different context and for a different purpose from those of the condition now in question, for they were introduced in connexion with applications for subsidies. Counsel said that on such applications it is unnecessary to inquire in advance as to the exact limit of the permitted occupancies and that the contributing authority need only satisfy itself whether a particular person who is proposed for occupation is an agricultural worker or not. While not disregarding the force of this comment, I feel that it would be a strong thing to say that language which has been acted on (albeit for a different purpose) for years, and without apparent difficulty, is incapable of sensible meaning. Secondly, one cannot divorce the terms of the condition from the subject-matter of the permission. This was not a large private residence, of the kind which might be let for a term of years. The subject-matter was a pair of farm workers' cottages to be built in an agricultural area. I have earlier indicated the probability that these will be let to persons who work on the neighbouring land. It is a further probability that such persons would have weekly tenancies or quarterly tenancies at most. There would not be the same difficulty arising from the condition in relation to such tenancies as might well arise if a property were let for a term of years, e.g., trouble between landlord and tenant. This appears to me to be a legitimate element to take into account; and combined with the Housing Act ancestry of the language in question it is, I think, enough (though only just enough)

(1) 68 J.P. 518; [1904] 2 K.B. 855.

to save the condition from destruction. With some reluctance, therefore, and more than a little doubt, I am of opinion that this point too should be decided in the council's favour.

If, then, the condition is neither ultra vires of the council nor void for uncertainty, the company can only succeed on this appeal if they can establish that the force of the condition is now spent. For this point they rely in their statement of claim on the fact (admitted by the council) that after the cottages had been erected by Mr. Clark they "were first occupied for a substantial period by persons whose employment was covered by the terms of the aforesaid condition". Counsel for the company submitted the point for our consideration, but did not pretend that it was his best one. It is quite clear to my mind from the terms of the condition and of the reason, that the former was intended to have permanent, and not merely temporary, force and effect. The question needs no development or elaboration, so I will merely say that, in my opinion, it must be decided adversely to the company.

For the above reasons, and those stated by LORD EVERSHED, M.R., I agree that the appeal should be allowed.

PEARCE, L.J.: The council are, by the terms of s. 14 of the Town and Country Planning Act, 1947, entitled to grant permission "subject to such conditions as they think fit". *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.* (1) makes it clear that the court will not interfere with that discretion unless it is shown that the authority did not take into account the right considerations, i.e., that they disregarded something which they should have taken into account or regarded something which they should not have taken into account. The onus of showing this is on the person seeking to upset the condition imposed by the authority. That onus may be discharged either by showing from the terms of the condition itself that the authority cannot have taken into account the right considerations or by extrinsic evidence to that effect. The principle has not been affected or altered by *Prescott* v. *Birmingham Corpn.* (2). That case was decided on the ground that the corporation owed a fiduciary duty to the ratepayers and had misapprehended the nature and scope of the discretion vested in them. Here there is no such element. When no reasons are given and decisions of authority present what LORD SUMNER called in another context "the inscrutable face of a sphinx", it is hard to discharge such an onus. However, in the case of conditions imposed under s. 14 it has been provided (by a statutory order) that reasons must be given. No doubt the purpose of that is to help and to inform the persons on whom conditions are imposed. Moreover, by the last four lines of s. 14 (1), and by s. 36 of the Act of 1947, indication has been given of the matters which the authority must take into account; but the general principle remains that the condition cannot be upset by this court unless it be shown that the authority have not taken into account the right matters.

Counsel for the company argues that the court can criticise and interfere with the condition itself even if the right matters have been taken into account. With all respect to his argument, I do not think that that is the right approach; but it is perhaps rather a question of words than a matter of substance. He is quite right to my mind in suggesting that the court will interfere if a condition is ridiculous. The reason for its interference is that the court will conclude from the folly of the condition that, however good the reasons which the authority

(1) 112 J.P. 55; [1947] 2 All E.R. 680; [1948] 1 K.B. 223.
(2) 119 J.P. 48; [1954] 3 All E.R. 698; [1955] Ch. 210.

say they took into account, they cannot in fact have taken into account the right considerations. For one essential matter which the authority must take into account is the imposing of an intelligible condition which can have some effect in achieving the other matters which they have properly taken into account. Thus, although he and counsel for the council travel by a different route in their arguments, they arrive at results which are not very far apart.

The court will, of course, hold a condition ultra vires if it does not "fairly and reasonably relate to the permitted development": see LORD DENNING'S judgment in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (1); but in this case it does so relate. Here there is no extrinsic evidence that the authority did not take the right matters into account. In my view, therefore, the question in the case before us is this. The authority having on the face of the expressed reasons taken the proper matters into account, can one infer merely from the possible absurdity or the inefficiency or uncertainty of the condition that they did not in fact do so? If the condition is absurd, or if it is sufficiently uncertain or inefficient, or sufficiently combines these qualities, I should have no hesitation in so inferring. So viewed, the question of uncertainty is not a separate point but merely one of the points whose cumulative effect may prove that the council cannot have taken the right things into account. There is no doubt that the condition is cumbrous and unsatisfactory and can in extreme instances produce ridiculous results. There could be circumstances in which the cottages could be occupied by rich retired canners from overseas or various other unsuitable persons who, like wraiths, have glided in and out of the arguments during the hearing of this case. But there are many legal principles which on their border-lines in some unlikely set of circumstances produce injustice or even absurdity. And in the case of a condition seeking to affect the character of the local population in the complexities of modern life, there may be difficulty in ensuring that application of that condition cannot at times produce ridiculous results.

To my mind, therefore, the possibility of absurdities is not in itself the true test. The test is: Are the absurdities and anomalies and uncertainties not merely theoretically possible but also so probable that they neutralise any beneficial results that the condition could have from a town planning point of view? And, therefore, is the net effect of the condition, looked at broadly, that it cannot be said to advance the town planning objects which are its ostensible justification? If a reasonable person could hold that it would so advance the town planning objects, then the court should not interfere. In framing the condition the authority have taken the wide, loose definition of "agricultural population" (to which in general terms they wished to limit the occupation of the cottages) from the Housing Act, 1936, s. 115 (2), together with the extended definition of "agriculture" contained in s. 119 (1) of the Town and Country Planning Act, 1947. But it is no answer, as counsel for the company rightly says, to an accusation of uncertainty that the condition contains words used in an Act of Parliament in another context. Had the clause ended at the words "or in forestry", most of the possible absurdities and uncertainties would have been avoided. The remaining words were unfortunately added, presumably with an intention of liberality, to increase the field of the possible occupants, and it would be unfortunate if words added to give a more liberal scope should destroy the whole condition. From a practical point of view I do not feel that the uncertainty is likely to produce expense or injustice. If a would-be tenant is on the border-line, he would probably not be accepted; and, if he was accepted,

(1) 122 J.P. 182; [1958] 1 All E.R. 625; [1958] 1 Q.B. 554.

the justices would in any enforcement proceedings feel both bound and inclined to give the tenant the benefit of any doubt that there could be. The condition is far from satisfactory. The authority ought not to impose a permanent fetter on a house without a careful consideration of its nature and careful consideration of how and when it should be removed or altered if changed circumstances make its removal or alteration just. It is only after some doubt that I have arrived at the view that the condition itself is not so unsatisfactory that it can be said to fulfil no town planning purpose and thereby to supply evidence that the authority did not take the proper matters into account. I think that this condition, looked at broadly, could on the whole be said to contribute to the maintenance of a green belt in the area. The cottages are small and in rural surroundings. The exclusion of many urban classes of population will tend in general towards limiting their occupation to rural persons who make them a permanent and not a week-end home. The persons who make their homes there are more likely to be people who are working than people who have retired, since in general the former exceed the latter in number. People who are working are more likely to be working locally since the occupants will tend to be persons of small means. In the main this condition does make the cottages available to people who may need to live in the country and does exclude many of the community who do not have to live in the country.

Counsel for the company further argues that the Act confers no power to impose conditions restricting the persons, or classes of persons, who may use the property, but only a power to impose conditions restricting the purpose for which it is used. In my view, that argument certainly cannot be accepted in terms so broad. The Act itself contains no express words limiting the scope of the conditions; and I think that the legislature must be taken to envisage some restriction on the persons occupying premises, since that itself is often the only means of restricting the purpose, e.g., a farm cottage restricted to the farm hand or the bailiff, a building near a hospital restricted to the housing of nurses. Where then, can one draw the line? It might be arguable that a restriction to a class of person fulfilling some office in relation to the adjoining land is the only permissible restriction; but that is a tenuous distinction, and I see no justification for inferring it. I think that restriction of persons is permissible if that restriction is of persons in relation to town planning, i.e., if the restriction is genuinely directed to securing for a given locality a certain class of occupant from a town planning point of view. It is clear that such restrictions should be closely watched. For, if they are imposed from some housing or public health or social consideration other than town planning, the authority would be taking a wrong matter into account and the restriction would on that ground be invalid see: *Pilling* v. *Abergele Urban District Council* (1). But in the case before us the restriction does not offend in that respect.

I cannot accept the further argument that the condition has spent its force after the first tenant has gone into occupation in accordance with it. The natural meaning of the words plainly restricts all future tenancies. There is no room for any implication that only the first tenancy is affected by them and no ground on which such an implication could be justified.

I have come to the conclusion, not without some reluctance, that the appeal should be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Solicitor and Clerk to Buckingham County Council*; *A. L. Philips & Co.*

F.G.

(1) 114 J.P. 69; [1950] 1 All E.R. 76; [1950] 1 K.B. 636.

HOUSE OF LORDS

(VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD KEITH OF AVONHOLM AND LORD DENNING)

December 15, 16, 17, 1958, March 24, April 30, 1959

SKEGNESS URBAN DISTRICT COUNCIL *v.* DERBYSHIRE MINERS' WELFARE COMMITTEE

Rates—Relief—Organisation concerned with advancement of social welfare—Holiday camp for miners, their dependants and invitees—Compulsory contributions levied under statute—Element of benevolence—Class sufficiently large—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *and* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

The ratepayers were the trustees of a holiday camp and ancillary premises which they occupied for the purpose of providing " a holiday centre and a recreation or pleasure ground for the benefit of workers in or about coal mines employed by collieries in the Derbyshire district ", including the workers' dependants and guests. The holiday camp was established under a fund raised by compulsory contributions levied under statute. The ratepayers were responsible for the expenses of maintaining and operating the camp, but received grants to cover capital expenditure from a social welfare organisation set up under statute. The ratepayers paid less than a rackrent for the premises, and they neither sought to nor did make a profit or loss on their operations. On the question whether the ratepayers were an organisation whose main objects were " concerned with the advancement of . . . social welfare " within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, so as to be entitled to limitation of rates under s. 8 (2) of that Act,

HELD: the ratepayers were an organisation concerned with the advancement of social welfare within s. 8 (1) (a) of the Act of 1955, because (i) there was an element of benevolence about the camp even though it was provided and maintained by a statutory levy or by contributions from a statutory body so far as it was not maintained by those who made use of it, the crucial test being the purpose for which the money was devoted and not the source from which it was derived, and (ii) the camp was concerned with the advancement of social welfare, the class in the community for which it provided a benefit being large enough to come within s. 8 (1) (a) of the Act of 1955.

APPEAL by the Skegness Urban District Council, from an order of the Court of Appeal (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), reported sub nom. *Derbyshire Miners' Welfare Committee* v. *Skegness Urban District Council*, 122 J.P. 74.

Sir Arthur Comyns Carr, Q.C., and *C. E. Scholefield, Q.C.*, for the local authority.
Geoffrey Cross, Q.C., and *J. Malcolm Milne* for the ratepayers.
J. W. Brunyate for the Charity Commissioners.

Their Lordships took time for consideration.

Apr. 30. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the short question in this case is whether the respondents, a body known shortly as the Derbyshire Miners' Welfare Committee, as the occupiers of a certain hereditament in the urban district of Skegness, which I will describe later, are entitled to the benefit of the relief against rates provided by s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. This question has been decided in their favour by the Court of Appeal, affirming a decision of a Divisional Court of the Queen's Bench Division. The contrary had been decided by the General Court of Quarter Sessions in and for the County of Lincoln (Parts of Lindsey).

It will be convenient to refer first to the relevant statutory provision, but I will remind your Lordships that previously no charitable or kindred institution (with certain immaterial exceptions) could, as of right, claim exemption from any general rate. Some rating authorities had, however, been accustomed to make sympathetic assessments on charitable organisations as a matter of grace. Uniformity was introduced by the subsection to which I have referred. Subsection (2) provided as follows:

> "For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as 'the first year of the new list'), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows, that is to say—(a) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force;"

Subsection (1) (a) of the same section was as follows:

> "This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare;"

Uniformity was further secured by the fact that, by the Local Government Act, 1948, the duty of making and amending valuation lists was transferred from the rating authority to the valuation officers of the Commissioners of Inland Revenue. The first general revaluation undertaken by them became effective on Apr. 1, 1956, from which date also the present claim to relief took effect.

My Lords, though I have been able to state the question very shortly, I find the facts extremely obscure. In the rate book for the year ending Mar. 1, 1956, the respondents were shown as the occupiers of the hereditament in question described as "Holiday Camp and Premises" with a rateable value of £1,476 and the rate payable was £1,758 18s. In the following year they were shown as occupiers of the same hereditament, but the rateable value was shown as £3,800 and the amount of rate as £3,040. Against this assessment they duly appealed to quarter sessions, and I have already stated the result of the proceedings up to the appeal to this House. So far all is clear, but, when I come to the Case Stated by the justices, on which the appeal proceeded, I find a great deal of confusion. I do not seek to apportion the blame for this state of affairs, except to say that it would not be fair to lay any responsibility for it on the justices or their clerk. In para. 8 of the Case it was said that the following facts were proved or admitted (I paraphrase them): (i) that the respondents were in fact the trustees of a trust known as the Derbyshire Miners' Welfare Convalescent Home and Holiday Centre; (ii) that "the Derbyshire Miners' Welfare Committee" was the short name by which they were generally known; and (iii) that they at all material times occupied the hereditament in question (and a further hereditament used as a convalescent home) for the purpose of a convalescent home and holiday centre for the use of workers in and about coal mines in Derbyshire (exclusive of South Derbyshire). Details of the hereditament with particulars of the buildings on it were then given, and it was stated that the camp was provided by the Social Welfare Organisation set up under s. 13

of the Miners' Welfare Act, 1952, which obtained the necessary funds from the National Coal Board. It was further found that the organisation only made grants for capital expenditure, and that it had always been their practice in doing so to make it a condition that the trustees would be responsible for maintenance and operational expenses. They further found that it was being run by trustees who sought to make neither a profit nor a loss on their operations. It is to be noted that this finding has not been challenged. They found also that the trust was the subject of an order made by the Charity Commissioners on Feb. 20, 1953, and they referred to various admissions of which I may mention these, that the only persons attending the holiday centre were workers in or about coal mines in the district of Derbyshire (excluding South Derbyshire), their wives and children, but that, if all the vacancies were not filled by these persons, they were filled by applicants from other coal fields, that generally there were no vacancies left to be filled by vacancies from other coal fields, that a charge varying from £5 15s. for an adult to £1 10s. for a small child was made for a week's holiday accommodation and full board, which charge included the return rail or omnibus fare from the visitor's home to Skegness, and that drinks and other refreshments were sold to persons staying at the holiday centre, alcoholic drinks being acquired by such persons as members of a club and in the winter by local residents who became members of the club, and that a substantial profit was made out of the supply of drink, but that the charge for accommodation was so fixed that, taking all the operations together, the trustees made neither a profit nor a loss.

I need not state the contentions of the parties before the justices beyond saying that the respondents contended that the purposes of the trust were charitable or (alternatively) were concerned with the advancement of social welfare, while the appellants denied both contentions. The justices were of opinion that the purposes of the trust were not charitable and were not otherwise concerned with the advancement of social welfare. I call attention to the fact that the justices proceeded on the footing that the trust on which the hereditament was held was that created by the scheme made by the Charity Commissioners but, nevertheless, thought that they were not thereby precluded from saying that it was not charitable.

But, my Lords, when, on appeal, the case reached the Divisional Court, for the first time it was said and not denied that the governing document was not the scheme made by the Charity Commissioners but a lease of Dec. 6, 1940, which had not been produced at the hearing before the justices, and it was on the footing that the trusts declared by this lease were operative that the appeal was thenceforward argued. The scheme was ignored. No communication appears to have been made either to the Charity Commissioners or to the Attorney-General. This was an irregular course on any view, but the more irregular because the trustees, abandoning the scheme, abandoned also the argument that the trust on which the property was held was charitable. For the trust declared by the lease could not (apart possibly from the validating effect of the Recreational Charities Act, 1958) be so regarded. Counsel for the trustees were, in fact, content to rest their case on the alternative claim that the hereditament was occupied

> "for the purposes of an organisation . . . which is not established or conducted for profit and whose main objects are . . . otherwise concerned with the advancement of . . . social welfare",

and they may, perhaps, regard the success that has so far attended them as justifying that course. I have felt some doubt whether even at this stage it

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would not be the proper course to remit the case to quarter sessions for a restatement of the Case, and I should have had no hesitation in advising your Lordships to do so, if I had not been of opinion that the appeal must in any event fail. As matters stand, I propose, therefore, to deal with the case as it has been presented to the House.

It is necessary then to turn to the lease of Dec. 6, 1940. The parties thereto of the first part, the lessors, were a number of persons described as "the Trustees on behalf of the Derbyshire District Miners' Welfare Committee" and the parties of the second part thereinafter called "the trustees" were a number of persons described as "the Trustees on behalf of the Derbyshire District Miners' Holiday Centre". It recited that, by s. 20 of the Mining Industry Act, 1920, a fund was established, which was thereinafter called "the Miners' Welfare Fund", to be applied to purposes connected with (inter alia) the social well-being, recreation and conditions of living of workers in or about coal mines, and the duty of allocating money from the said fund was vested in the committee, thereafter called "the Miners' Welfare Committee" appointed under sub-s. (3) of the said section as varied by s. 1 of the Mining Industry (Welfare Fund) Act, 1939, and s. 15 of the Mining Industry Act, 1926, that a committee styled the "Derbyshire District Miners' Welfare Committee" constituted as therein mentioned had been set up to advise the Miners' Welfare Committee in regard to allocations from the said fund for the purposes aforesaid within the said district, and that the latter committee had, on the advice of the former, allocated a sum of £35,000 for the purpose of providing a holiday centre for the use and benefit of workers in or about coal mines, and more particularly such of them as were resident in the Derbyshire district, and that the trustees had been appointed to administer the said sum and such other sums, if any, as might thereafter be allocated, given or bequeathed for the purposes of the trusts thereinafter declared. It was then, by the deed, witnessed that the lessors demised the hereditament which is the subject-matter of this appeal to the trustees for the term of twenty-one years from Jan. 1, 1939, at a yearly rent of £200. The trustees entered into the usual lessee's covenants and, after a number of other provisions which need not be stated, they declared that they would

> "permit the demised premises to be used for the purpose of a holiday centre and a recreation or pleasure ground for the benefit of workers in or about coal mines employed by collieries in the Derbyshire district (including the dependants and invitees of [such] workers)."

The lease also contained a provision in regard to keeping accounts and methods of charging which were relevant to the question whether the "organisation" was "established or conducted for profit" but, as that is not now suggested, it need not be further stated.

Much still remains obscure. It is not clear what was the relation of the parties to the lease to each other, nor in whom the hereditament was originally vested. It does not appear either from the recitals in the lease or from the Case Stated how the sum of £35,000 mentioned in the recitals was, in fact, expended, nor do the voluminous accounts which were put in evidence give any sure guide. I will, however, assume, as it has throughout been assumed, that this sum was in some way, either by purchase of the land or by the erection of buildings on it, expended for the purpose of a camp and holiday centre and that those who made use of it therefore got a benefit which could not be regarded as unsubstantial. I can also assume—and in this respect some assistance can be derived from the Case Stated—that, on the passing of the Miners' Welfare Act, 1952, the property passed to a body set up under that Act and called

"the Social Welfare Organisation" to which the National Coal Board was under an obligation to pay sums necessary to meet the estimated costs of social welfare activities. These activities were defined as meaning

> "activities concerned with the maintenance or improvement of the health, social well-being, recreation or conditions of living of—(a) persons employed in or about coal mines . . ."

or their dependants. It is also pretty clear that the sum of £35,000 to which I have referred was not derived from any voluntary contributions, but was the fruit of a compulsory levy, and that any other sums that may be necessary for the maintenance of the camp, so far as it is not met out of charges to the beneficiaries, are provided by the National Coal Board. It is this fact on which the appellants largely rely.

My Lords, I turn again to the relevant section and note first the curious wording "occupied for the purposes of an organisation . . . whose main objects", etc. It is by no means clear to me what is the "organisation" whose main objects have to be considered. Is it the "Social Welfare Organisation" set up under the Act of 1952 to which I have already referred? Or is it the body of trustees who appear in fact to manage the holiday centre, or is it a committee, whether the Miners' Welfare Committee which has been mentioned or some other committee? It is not a satisfactory way of disposing of the case, but I see no alternative to saying that, whatever the "organisation" may be, its main object is nothing else than the provision of a holiday centre such as is described in the Case. If so, the question is whether such a provision is concerned with the advancement of social welfare.

My Lords, this question surely admits of only one answer. I agree with what has been said by DONOVAN, J., and ORMEROD, L.J., on this point. It is unnecessary and probably impossible to give a comprehensive definition of social welfare. But it would be a strange definition which was not wide enough to include what is, under modern conditions, widely regarded as so important to happiness and general well-being as a so-called holiday centre. If this is so, why is not the hereditament here in question entitled to the benefit of the section? The alleged reasons appear to be these.

In the first place, the appellants rely, as I have already indicated, on the fact that the holiday centre was provided and maintained by a statutory levy or by contributions from the National Coal Board so far as it was not provided and maintained at the expense of those who made use of it. They urge that a trust or institution cannot be regarded as charitable if it is not created by the benevolence of a donor or donors, and that that element is absent in the present case. Next, they say, that, just as benevolence or altruism is a necessary element in legal charity, so an object of an organisation cannot be regarded as "otherwise concerned with the advancement of social welfare" unless it, too, has such an element. I accept neither of these propositions. The crucial test is the purpose to which money is devoted, not the source from which it is derived; see *A.-G.* v. *Eastlake* (1). An elaborate argument was addressed to us to show that the decision in that case was based on a misunderstanding of what LORD ELDON said in *A.-G.* v. *Dublin Corpn.* (2). But whether this be so or not, the decision has never, so far as I know, been questioned, and I think it was clearly right.

In the next place, the appellants argued that the provision of a holiday centre in the present case did not advance social welfare because it provided

(1) (1853), 18 J.P. 262.
(2) (1827), 1 Bli. N.S. 312.

a benefit for only a limited class in the community. Once again recourse was had to the analogy of charity law, and *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* (1), and similar cases were invoked to support this proposition. I make the answer that I made to the first argument. There is no justification for supposing that the legislature intended to import the highly artificial considerations which distinguish or disfigure the law of charity into the latter part of the subsection. Neither the words themselves nor the context demand it, and I think that all the court has to do is to forget all the refinements of charity law and ask itself the simple question that I have already posed. I do not doubt that there will be borderline cases, but it does not appear to me that, in the present case, the question is difficult to answer.

Thirdly, it was argued that some distinction is to be made between the "advancement" of social welfare and the "provision" of social welfare, and that, in the present case, the main object of the "organisation" which we are considering (whatever that organisation may be) is not the advancement of social welfare but merely the provision of a holiday centre. On this point, which seems to me to be little more than playing with words, I will, with respect, adopt what ORMEROD, L.J., said. The provision of a holiday centre of this nature appears to me precisely to be "concerned with the advancement of social welfare".

My Lords, before I conclude this opinion I must revert for a moment to a matter on which I have already made some observations. I have pointed out that the Divisional Court and Court of Appeal alike disregarded the fact that a scheme had been made by the Charity Commissioners which, if it was valid, imposed on the land, the subject of the contested rate, trusts different from those created by the 1940 lease. At the end of the original hearing before this House, it appeared to their Lordships that this course ought not to be adopted without at least giving the commissioners an opportunity of being heard. They accordingly adjourned the hearing and, at the adjourned hearing, the commissioners attended by counsel and contended that, except as to some parcels of land comprised in the scheme, they had validly exercised their jurisdiction. They were, however, willing (as were counsel for the appellants and the respondents) that, so long as their position was not prejudiced, the case should be decided on the footing that the respondents at the relevant time in fact occupied the land in question on the trusts created by the 1940 lease, i.e., on the footing on which the case was decided in the courts below. In these circumstances, since that is, in any view, the footing most favourable to the appellants, their Lordships agreed to take an unusual and generally undesirable course and decide the case on what may after all prove to be a false assumption.

I have already stated the conclusion to which, on this footing, they have come. The appeal must be dismissed, but, in dealing with the costs, they must have regard to the fact that the respondents did not, until the case reached the Divisional Court, produce the 1940 lease which then became the most material document, and did not until the appeal had been opened in this House, produce other documents, which, had they been at the outset made known to the appellants, might have affected their conduct in these proceedings. The order will be that the parties will bear their own costs of this appeal, except that the respondents must pay the appellants' costs of the adjourned hearing on Mar. 24. The Charity Commissioners will bear their own costs.

My noble and learned friend, **LORD MORTON OF HENRYTON,** who is unable to be here today, has asked me to say that he concurs in the opinion which I have just read.

(1) [1951] 1 All E.R. 31; [1951] A.C. 297.

LORD REID: My Lords, I concur.

LORD KEITH OF AVONHOLM: My Lords, I agree with the speech delivered by my noble and learned friend on the Woolsack.

LORD DENNING: My Lords, for nearly forty years the coal industry has built up a special fund for welfare purposes. In the early days it was done by means of a compulsory levy on colliery owners and royalty owners. In recent times it has been done by way of grants by the National Coal Board. The fund has been held and controlled by various bodies, at first by a Miners' Welfare Committee, then by a Miners' Welfare Commission, and latterly by the Coal Industry Social Welfare Organisation. These bodies have all followed one another, each taking over from the one before, so I may perhaps describe them all as the " Social Welfare Organisation ".

The Social Welfare Organisation has applied the fund in promoting the social well-being, recreation, and conditions of living of mine workers. It has done this in accordance with statutory provisions in that behalf. One of the activities which it has supported is a holiday centre at Skegness. This is especially for the use of miners from North Derbyshire. It is situated on an extensive piece of land next the sea and comprises a holiday camp complete with chalets, kitchen, dining hall, theatre, bars, lounges, shops and so forth. The Social Welfare Organisation provided the capital moneys by which this holiday centre was acquired and built. The justices at quarter sessions find that " this camp was provided by the social welfare organisation ". The legal title is not, however, vested in the Social Welfare Organisation. It was at one time vested in a district committee but it has since been vested in the Official Trustee of Charity Lands; and it is included in a scheme prepared by the Charity Commissioners. The justices at quarter sessions so found, and their findings have, I think, been in substance re-established by the material brought before your Lordships by the Charity Commissioners. The Social Welfare Organisation has not itself administered or managed the holiday centre. This has been done, under the authority of the scheme, by a committee of eight persons, all of whom are connected with the coal industry in the East Midlands. Four of them are appointed by the employer's side (the National Coal Board) and four by the men's side (the National Union of Mineworkers). These eight persons are described as " the Derbyshire Miners' Welfare Committee ". They are, say the justices, the occupiers of the holiday centre. They are liable, therefore, for the rates payable on it. They also, I may remark, run a convalescent home next to the holiday centre. The only persons who use the holiday centre are mine workers and their families. The charge is £5 15s. for an adult and £1 10s. for a child. For this they get a week's holiday with full board and return fare to and from Skegness. The charge for accommodation is thus very modest. This is because the committee do not seek to make any profit. Nor do the committee have to pay any rent. And they make a substantial profit on drinks and this is used to lower the charge for accommodation.

Such being the facts, if I were asked: " For what purpose is this land used? Is it used 'for the advancement of social welfare'? " I should probably say " Yes ". But I would hasten to point out that the question is not " For *what* purpose is the land used? " The question is: " For *whose* purpose is it used? " or more accurately: " For the purposes of *what organisation* is it used, or rather, occupied? " Many a holiday camp is used for similar purposes to this one. The holiday camps of Messrs. Butlin provide holidays at low cost for people who could not otherwise afford them, but they do not obtain relief

from rates on this score. The reason is because that organisation does not qualify under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Again, many convalescent homes obtain relief, but only if the relevant organisation qualifies. The convalescent home in *National Deposit Friendly Society (Trustees)* v. *Skegness Urban District Council* (1), did not get relief, because the friendly society did not qualify. And I would add that it is not always right to take the occupier and treat him as the "organisation". In the case of a members' club the committee of management occupy the club house, but it is occupied, not for the purposes of the committeemen, but for the purposes of the club itself. The relevant organisation is the club itself—the unincorporated association—and, in order to get relief from rates, the club itself must qualify under s. 8 (1) (a).

What, then, is the relevant organisation in the present case? This is the crucial question, but it does not appear to have been discussed in the courts below. The relevant organisation may be the eight persons on the committee who run the holiday centre. Or it may be the Social Welfare Organisation which has provided, and still provides, all the capital moneys that are needed. But neither of these organisations confine their activities to the holiday centre alone. The main object of the committee of eight, as appears from the scheme, is to provide and maintain a convalescent home for the miners of North Derbyshire, and, subject thereto, a holiday centre for them. The main object of the Social Welfare Organisation, as appears from the Miners' Welfare Act, 1952, is to support and carry out "social welfare activities" throughout the coal industry of this country. But the discussion in the courts below has been on the footing that the relevant organisation (whatever it is) has as its sole object the provision of the holiday centre; and attention has, therefore, been concentrated on whether that object alone is concerned with the advancement of social welfare. Your Lordships have been invited to deal with the case on this same footing, and I suppose you may. All I am concerned to point out is that it is not the right footing. But, taking it as the only question, I agree that the provision of this holiday centre is concerned with the advancement of social welfare. It fulfils all the criteria laid down by this House in the *National Deposit Friendly Society* case (1). I agree, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Wrentmore & Son; Donald H. Haslam*, for *Lawrence C. Jenkins*, Nottingham; *Treasury Solicitor.*

G.F.L.B.

(1) 122 J.P. 399; [1958] 2 All E.R. 601.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

April 29, 1958

R. *v.* ARUNDEL JUSTICES. *Ex parte* JACKSON

Road Traffic—Careless driving—Sentence—Fine and disqualification—Disqualification beyond maximum period—Appeal—Power of court to quash order of disqualification only.

Where a defendant has been convicted of careless driving and both fined and disqualified for holding a driving licence, the disqualification is severable from the conviction and fine. Where, therefore, excessive disqualification has been imposed, the Divisional Court has power, on certiorari to quash the disqualification without quashing the conviction and fine.

R. v. *Willesden JJ. Ex parte Utley*, (1947), 112 J.P. 97, distinguished.

APPLICATION for order of certiorari.

The applicant, Martin Buxton Jackson, was convicted at Arundel Magistrates' Court of driving without due care and attention. He had no previous conviction. The justices fined him £20 and disqualified him for holding or obtaining a driving licence for 12 months, and the applicant obtained leave to apply for an order of certiorari to bring up and quash the order of the justices. The grounds of the application were that, as the applicant had no previous conviction, the maximum period of disqualification to which he was liable under s. 12 of the Road Traffic Act, 1930, was one month, and, therefore, the justices had acted in excess of their jurisdiction.

J. R. Phillips for the applicant.

Anthony Harmsworth for the respondent.

LORD PARKER, C.J., stated the facts and continued: The justices did exceed their jurisdiction, and the sole question is whether the court must, therefore, quash the whole of the order, conviction and sentence or whether the disqualification is supplemental to the conviction and severable from it, so that the court need only quash the disqualification. It seems perfectly clear that the fine of £20 and the conviction are clearly not severable, and if £20 had been in excess of jurisdiction then the whole order including the conviction would have to be quashed. That is the effect of *R.* v. *Willesden JJ., Ex p. Utley* (1).

In the present case, however, the disqualification in question is really supplementary to the rest of the order, and without going into the reasons therefor, I need only say that the matter has been twice before this court, and in both cases this court has decided that that is the proper view and the court need only quash the disqualification. The cases are not fully reported, but they appear sufficiently from 117 J.P. Jo. 177. In *R.* v. *Droxford JJ., Ex p. Hale* (2) LORD GODDARD, C.J., is reported to have said:

> "The court, therefore, quashes the order of disqualification. We do not quash the conviction or the penalty because s. 6 (2) of the Road Traffic Act, 1930, points out that the order for disqualification is different from the conviction, and it expressly gives power to a disqualified person to appeal

(1) 112 J.P. 97; [1947] 2 All E.R. 838; [1948] 1 K.B. 397.
(2) (1953), 117 J.P. Jo. 177.

against the order of disqualification as if it were a conviction. That shows that it is something separate, and it is perfectly easy to sever that part of the order which deals with disqualification from that part of the justices' adjudication which deals with the penalty. We cannot, in quashing the order for disqualification, substitute the right period, but there is no reason why we should quash that part of the order which deals with the penalty."

Accordingly, in my judgment an order of certiorari must issue and that part of the order which provides for a disqualification of twelve months must be quashed.

DONOVAN, J.: I agree.

SALMON, J.: I agree.

Order for certiorari.

Solicitors: *Chalton Hubbard & Co.*, for *Malcolm, Wilson & Cobby*, Worthing; *Dell & Loader*, Shoreham.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

April 30, 1959

EVANS *v.* BROOK

Rating—Application by rating authority for distress warrant—Claim by occupiers for relief under s. 8 of Rating and Valuation (Miscellaneous Provisions) Act, 1955, refused—No appeal to quarter sessions—Facts not substantially in dispute—No right of magistrates to decline jurisdiction—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2, c. 9), s. 8 (1) (c), (2).

Where a rating authority apply to a magistrates' court for a distress warrant in respect of unpaid rates, the magistrates have jurisdiction, at any rate in a case where the facts are not substantially in dispute, to determine whether the defendant ought to have been rated at all, or, if so, whether for the full rateable value or for a lesser amount having regard to some provision in relief. The only possible exception to this rule, which is an exception based on convenience, is where the facts are not agreed and are complicated.

General rates were levied by a rating authority on premises occupied by a bowling club. The club applied to the rating authority for partial relief under s. 8 (1) (c), (2), of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, but the application was refused, and the club did not appeal to quarter sessions. They paid the amount of rates which would be due if they were entitled to the relief claimed, and the rating authority applied to a magistrates' court for the balance due. The magistrates decided that they had no jurisdiction to determine the claim to limitation of rates.

HELD: that, as the facts were simple and not in dispute, the magistrates had jurisdiction to determine the claim, and that the case must be remitted to them with a direction to do so.

CASE STATED by Crewe justices.

An application was made at Crewe Magistrates' Court by the appellant, Wilfred Evans, town clerk of Crewe, on behalf of Crewe Corporation, the rating authority, for a distress warrant against the respondent, Alan Brook, the secretary of the Crewe Bowling Club, for the sum of £126 11s. 8d. general rates, alleged to be due on the hereditament known as a bowling green, pavilion and

premises in Crewe Road. That sum was due, unless, as the club claimed, they were entitled to relief under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The club had applied for relief under that section, but it had been refused by the rating authority, and the club had not appealed to quarter sessions. They had paid the portion of the rates due if they were entitled to relief. The facts were not substantially in dispute, and both the rating authority and the respondent were anxious that the magistrates should determine the question whether relief was due or not. The magistrates held that they had no jurisdiction to determine the matter, and the appellant appealed.

Robin David for the appellant.

The respondent did not appear.

LORD PARKER, C.J.: The facts are simple. The total amount of rates levied by the rating authority for the period from Apr. 1, 1956, to Sept. 30, 1958, was the sum of £275 9s. 2d. Of that, £148 17s. 6d. had been paid by the ratepayers. Accordingly, there was due still £126 11s. 8d. unless, as the ratepayers claimed, they were entitled to relief under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The relevant provisions of that section for this purpose are:

> "(1) This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare; (b) any hereditament held upon trust for use as an almshouse; (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field . . .
>
> "(2) For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as ' the first year of the new list '), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows . . .",

and then there are set out certain limitations. The ratepayers had put in an application for relief under that section, and it had been rejected by the rating authority. What the reason for that was, we do not know, but it is suspected that it was that the rating authority were not satisfied that the hereditament was used mainly or exclusively for the purposes of open-air games. At any rate, relief was refused, and accordingly this application was made for a distress warrant in respect of the amount alleged by the rating authority to be due.

The magistrates, with whom I personally have every sympathy, quite clearly struggled to find that they had no jurisdiction to determine the question whether relief was due or not. They declined jurisdiction. It is against that that the appellant on behalf of the ratepayers appeals. It is only right to say that before the magistrates the rating authority combined with the appellant to try to persuade the magistrates to deal with the matter. No doubt in a case such as this, which is perfectly simple and where, as we are told, the facts are not really in dispute, it is convenient for both the ratepayers and the rating authority to have the matter determined by the magistrates; but, from the magistrates' point of

view, if they have jurisdiction in this case they may be thought to have jurisdiction in the more difficult cases that arise under s. 8 (1) (a).

The position seems to have been that for a long time it was held that on an application for a distress warrant the magistrates had no jurisdiction to go into the question of the validity of the amount claimed if that could be the subject of an appeal, and I confess that at one time I felt, on that line of case, that here there was an appeal to quarter sessions and that, the right of appeal not having been exercised, it was not for the magistrates to deal with the matter.

The leading case on what I may call the earlier practice was *Churchwardens of Birmingham* v. *Shaw* (1). The matter was put by LORD DENMAN, C.J., in this way:

> "We are driven, therefore, to consider the second ground on which the rule is supported, whether namely, as regards the present rates, the society is deprived of the benefit of its exemption, because it has not appealed against them. And, as it cannot be successfully contended that the president might not have appealed, the question is narrowed to this, whether, there being a remedy by appeal, and that remedy passed by, the law will allow an action to be brought for the enforcement of a rate, good on its face, and made by a competent authority, on a person, and in respect of the occupation of property, apparently within the jurisdiction of that authority. This is not a new question; nor is the principle of decision unsettled or difficult. The only difficulty lies in its application. The right of appeal is coextensive with the operation of the rate. Whether it has defects which make it even a nullity in law, or be objectionable only as excessive in amount, or unequal in its assessment, anyone who is grieved by it may appeal; but the right of action is limited, as well for the sake of convenience, as on principles of law and justice."

Accordingly it was held in that case that the magistrates had no jurisdiction. That was in 1849.

By 1916 and, indeed, earlier, the position had been rather changed: see *Whenman* v. *Clarke* (2). Similar questions there arose, and SWINFEN EADY, L.J., in the Court of Appeal, referred to *Churchwardens of Birmingham* v. *Shaw* (1), and he went on to refer to a dictum of BOWEN, L.J., in *R.* v. *Hannam* (3). BOWEN, L.J., said:

> "'I desire to reserve a further possible exception, upon which I express no opinion—namely, where the exemption from rating is enacted by a public Act of Parliament of which the whole world has notice, and which the rating authority must or ought to know, and which, as soon as the statute is read, destroys the rateability without throwing any onus upon the occupier of proving anything so as to gain the exemption for his property. I am not sure whether the justices may not in that case refuse to enforce the rate'"

SWINFEN EADY, L.J., cited from *Wixon* v. *Thomas* (4) where LORD ALVERSTONE, C.J., said:

> "'It is impossible at the present day to apply in all its strictness the old rule that justices are not entitled to entertain, on an application for a warrant, any matter which might be raised on an appeal'."

(1) (1849), 10 Q.B. 868; sub nom. *R.* v. *Shaw, Birmingham JJ.*, 13 J.P. 395.
(2) 80 J.P. 128; [1916] 1 K.B. 94.
(3) (1886), 34 W.R. 355.
(4) 75 J.P. 58; [1911] 1 K.B. 43; [1912] 1 K.B. 690.

SWINFEN EADY, L.J., approved a rule which was laid down by BRAY, J., and ATKIN, J., in the Divisional Court in these terms:

> " 'that the justices have jurisdiction if the question is whether the defendant ought to have been rated at all, or, if at all, for the full rateable value.' In my opinion this is a good working rule, and ought to be followed, where the material facts are not really in dispute."

To the same effect were the judgments of PHILLIMORE, L.J., and PICKFORD, L.J., PICKFORD, L.J., pointing out that no principle could really be found that underlay all the cases, but that it was a question of the balance of convenience. Ever since that case it has been clear that when there is no substantial dispute on the facts it is for the magistrates to inquire whether the amount claimed is due having regard to some exceptions in relief.

The latest case dealing with the matter is *West Hartlepool Corpn.* v. *Northern Gas Board* (1), where LORD GODDARD, C.J., stated categorically:

> " It is said that the justices had no power to inquire into what was the amount leviable, but the appellants [the rating authority] had gone to the justices for the purpose of enforcing arrears of rates; they were asking . . . for a distress warrant. The first thing the justices have to do is to be satisfied that some sum was due and owing . . ."

In the present case, at any rate, the facts are largely agreed. It is a perfectly simple issue and, reluctant as I am to come to this decision, I feel that the authorities force one to hold that this was a matter within the jurisdiction of the magistrates. Indeed, such matters are always within their jurisdiction, subject to the possible exception that arises if the facts are not agreed and are complicated. That exception is, however, an exception based on convenience and not on any rule of law. In my judgment, the appeal must be allowed and the matter remitted to the magistrates.

DONOVAN, J.: I agree. The only doubt that I have had in this case is whether the right of appeal to quarter sessions against the rate, on which appeal this point could be raised, must be regarded as exclusive of any right when a distress warrant is applied for at petty sessions. The decisions cited by the Lord Chief Justice resolve this doubt quite clearly in a case like the present, where the primary facts relating to the question of relief are not in dispute. The magistrates say:

> " The question whether or not the Crewe Bowling Club is a playing field within the meaning of s. 8 of the [Rating and Valuation (Miscellaneous Provisions) Act, 1955] is essentially a question of fact."

So expressed, I should have thought that the question was one of law rather than fact, but I suspect that the real question is whether the admitted facts mean that the bowling green and the pavilion constitute a hereditament used mainly for the purposes of open-air games or for open-air athletic sports within the meaning of s. 8. However, if all the primary facts bearing on that question are agreed and the only problem remaining is the true conclusion to be drawn from them, I do not think that that circumstance is enough to deprive the magistrates of jurisdiction. I agree, therefore, that the case should go back to the magistrates for further consideration.

SALMON, J.: I agree.

Solicitors: *Gibson & Weldon.*

Case remitted.

T.R.F.B.

(1) 121 J.P. 161; [1957] 1 All E.R. 394.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

April 30, 1959

PENDER AND OTHERS *v.* SMITH

Licensing—Taking intoxicating liquor from licensed premises outside permitted hours—Crate of bottles ready to be removed—Intervention of police before crate taken outside premises—Licensing Act, 1953 (1 & 2 *Eliz.* 2, *c.* 46), *s.* 100.

By s. 100 of the Licensing Act, 1953: "... no person shall, except during the permitted hours ... (b) ... take from, any [licensed] premises any intoxicating liquor."

No offence is committed under the aforementioned section unless and until the intoxicating liquor is taken outside the licensed premises.

CASE STATED by the recorder of Liverpool.

The appellants, John Pender and others, were convicted by the Liverpool stipendiary magistrate of taking intoxicating liquor from licensed premises outside the permitted hours. They appealed against their convictions to quarter sessions. The recorder found, inter alia, that before 10 o'clock in the evening, when the licensing hours in the district ended, of July 5, 1958, the appellants, or some of them, bought in the off-licence portion of the Bow and Anchor Hotel, Mab Lane, Liverpool, a crate containing two dozen bottles of beer and stout and carried it to the smoke room of the hotel. At approximately 10.23 two of them, accompanied by the other two, were carrying the crate from the smoke room into the entrance hall when two police officers entered the hall and caused the crate to be deposited on the floor. It was the intention of the appellants to remove the crate from the premises in the highway and that purpose would have been accomplished by them as a concerted act had not the police intervened. The recorder dismissed the appeals, and the appellants appealed to the Divisional Court.

Rankin for the appellants.

Guthrie Jones for the prosecutor.

LORD PARKER, C.J.: These are appeals, by way of Case Stated, from the judge of the Crown Court at Liverpool sitting as recorder of that city, before whom the appellants appealed against their convictions by the stipendiary magistrate of Liverpool of offences against s. 100 (1) of the Licensing Act, 1953. The recorder dismissed the appeals, holding that the offences were proved. Section 100 (1) provides, so far as it is material here, that

> "... no person shall, except during the permitted hours ... (b) ... take from, any [licensed] premises any intoxicating liquor."

The short facts were these. The four appellants had apparently bought a crate of beer from the off-licence portion of the Bow and Arrow Hotel, Mab Lane, Liverpool. They did not remove it at once, but they took it into the smoke room of the hotel where they were going to continue drinking on the premises. They were minded ultimately to take the crate away and continue drinking somewhere else. At 10.23 p.m., licensing hours having ended at 10 p.m., they began to remove the crate, and they were in the process of taking it out of the smoke room and into the entrance hall when two police officers entered. The very short question in this case is whether in those circumstances those four men can be said to have taken the crate from any such premises, namely, the hotel.

I do not propose to look at any dictionary or even to consider the various examples of the use of the words " take from ", whether it be larceny from the person or taking a book out of a room or any matters of that sort. It seems to me perfectly clear here from the words used that no offence has been committed until the intoxicating liquor is taken from and gets outside the licensed premises. Accordingly, in my judgment, the police struck too soon and no substantive offence under the section was committed.

I should add that the recorder stated in the Case that, if he were wrong, he was satisfied, as indeed is clear, that there had been an attempt to commit the statutory offence and that he would be prepared to find the appellants guilty of that offence. In this court that alternative has not been pursued, if only for the reason that before the stipendiary magistrate these appellants were charged with the substantive offence and not with an attempt to commit an offence. There being no jurisdiction in the magistrate to convict of an alternative offence, namely, of an attempt, even if that were possible, the matter cannot arise here.

In my judgment these appeals must be allowed.

DONOVAN, J.: I agree. Counsel for the respondent whose task, if I may say so, excites my sympathy, has had to ask us to read " takes from " in s. 100 of the Licensing Act, 1953, as being equivalent to " found in the process of taking from ". One cannot read a penal section in that way. The ordinary and natural meaning of s. 100 in this respect is of a completed act being referred to and nothing else.

SALMON, J.: I agree.

Appeals allowed.

Solicitors: *John Hands & Son*, for *John O. Cowper*, Liverpool; *Cree, Godfrey & Wood*, for *Town Clerk*, Liverpool.

T.R.F.B.

QUEEN'S BENCH DIVISION

(Lord Parker, C.J., Donovan and Salmon, JJ.)

April 30, May 1, 1959

ROSS *v.* RIVENALL

Road Traffic—Unlawfully taking and driving away motor vehicle—Using uninsured motor vehicle—Four persons in car in early morning—Car six miles from point where taken with lights on—Defendant sitting in rear seat—No explanation at time by defendant of presence in car—Case for defendant to answer—Road Traffic Act, 1930 (20 *and* 21 *Geo.* 5, *c.* 43), *s.* 28, *s.* 35.

The defendant was convicted at a magistrates' court of unlawfully taking and driving away a motor vehicle and of using the vehicle when uninsured. He appealed against both convictions to quarter sessions, and the following facts were found by the recorder. Between 7.30 in the evening of Aug. 29, 1958, and 8.30 next morning a Ford Consul motor car was taken and driven away without authority. It was left by the owner locked with no ignition key and with petrol in it sufficient only for a journey of six miles. On Aug. 30 the car was found stranded about six miles from the point where it had been taken with four men, including the defendant in it. The appellant was lolling in the back seat with his feet outstretched and his head back. No ignition key was there, but the lights were on. When the appellant was told that he was going to be arrested, he made no reply. At the police station the appellant said to a police officer: " A bloke

stopped and asked me if I wanted a lift, so I got in." At the close of the case for the prosecution the recorder was of opinion that no prima facie case had been made out that the appellant was acting in concert with the driver or other persons in the car and dismissed both informations against the defendant. On appeal by the prosecutor,

HELD: that on the facts there was a prima facie case of association between the defendant and the driver of the car, and that the case must be remitted to the recorder to hear and determine.

CASE STATED by the recorder of West Ham.

The appellant, Raymond Kenneth Ross, had been convicted of two offences by a magistrates' court sitting at West Ham on Sept. 8, 1958. The appellant had been charged by the respondent, John Rivenall, a detective constable of the Metropolitan Police, that between Aug. 29 and 30, 1958, at Frederick Street, Stratford, E.15, (i) he unlawfully took and drove away a Ford Consul motor car without having either the owner's consent or other lawful authority, contrary to the Road Traffic Act, 1930, s. 28, and (ii) he unlawfully used a motor vehicle without there being in force in relation to the user of the vehicle a policy of insurance or such security in respect of third-party risks as complied with Part 2 of the Act of 1930, contrary to s. 35 of the Act of 1930. He appealed to quarter sessions against both convictions. At the hearing of the appeals on Sept. 29, 1959, the following facts were found. Between 7.30 p.m. on Aug. 29, 1958, and 8.30 a.m. on Aug. 30, 1958, a Ford Consul motor car, the property of the Stratford Car Hire Co., was unlawfully taken and driven away from the company's premises at Frederick Street, Stratford, E.15, without the owner's consent or other lawful authority. The car had been left locked and closed (though one of its window catches was faulty) and with no key left in it. It had only enough petrol in it to run for a distance of about six miles. At 1.55 a.m., at the junction of Woolwich Road and Westcombe Hill, the car was seen being driven by a man called Richards. A man called Goodier was the front passenger, and a man called Waddington and the appellant were sitting in the back. When the car was seen by the police, Waddington and the appellant were sitting very low in the rear seat, with their feet outstretched and their heads back. When the police sergeant went up to question them, leaning through the door of the car, they stayed in the same position. Neither made any attempt to run away. The car apparently ran out of petrol at the junction, and Richards and Goodier started to push it back off the crown of the road on to its nearside kerb. Goodier also asked a nearby policeman where to get petrol. When all four men were told they would be arrested for being in unlawful possession of the car, none of them made any reply after caution. At the police station, when the appellant was asked how he came to be in the car, he said: "A bloke stopped and asked me if I wanted a lift, so I got in ". When all four men were seen in the car, the car's ignition and oil lights were both on but there was no ignition key in the lock. An examination of the wiring showed that one fuse had been removed and placed between the wires of the starter (thus enabling the car to run without ignition). There was no damage to the doors.

At the end of the case for the prosecution, it was contended by the respondent that no further evidence of association between the driver and the appellant was necessary by the prosecution to make out a prima facie case. The prosecution need only prove two facts in order to make out a prima facie case here, namely, that (i) the vehicle concerned had been unlawfully taken and driven away by somebody without the owner's consent or other lawful authority, and (ii) the appellant was a passenger in the circumstances of the case. It was for the appellant to give evidence to satisfy the court that he had, or reasonably thought he had, lawful authority for being where he was when arrested, and,

until such time or such evidence was given by him or on his behalf, then a prima facie case against him remained. In any event, the prosecution had proved that the appellant was using the vehicle for which there was no insurance.

The recorder came to the conclusion that the prosecution had failed to make out a case on either charge for the appellant to answer. He was of opinion that the facts were reasonably consistent with the conclusion that the appellant might well have been an innocent passenger and that the prosecution had failed to prove to the contrary. He, therefore, allowed the appeal. The prosecutor appealed to the Divisional Court. The question for the opinion of the court was whether, on the above facts, he came to a correct determination and decision in point of law.

Trott for the appellant.

Wrightson for the respondent, the prosecutor.

LORD PARKER, C.J., stated the facts, and continued: Where, as here, four men are found in a motor car out of petrol, at 1.55 a.m. six miles from where the car was taken, and, when arrested, say nothing, there clearly was, I think, a case to go to the jury, if there was a jury, that the four men were acting in concert. If that does not constitute evidence of acting in association together, it would be well nigh impossible in cases of this sort to prove a case against anyone except the driver of the car.

The learned recorder was clearly impressed by the fact that a police officer gave evidence that, when these men had been taken to the police station and the appellant was questioned, he said to the police officer—"A bloke stopped and asked me if I wanted a lift, so I got in." The recorder seems to have thought that that was a possible reason for the appellant's being in the car, and that, accordingly, a prima facie case of acting in concert had not been made out. For my part, I cannot read that evidence as in any way destroying what appears to me to be the prima facie view that one would take, viz., that these four men were acting in concert. It was the excuse which a guilty man would make; and it was only what the police officer said that the appellant had said. It clearly called for the appellant to give evidence on oath to the effect of what the police officer had said, before it could be said that there was a reasonable excuse for the appellant's presence in the car.

I am quite satisfied on the facts of this case that a prima facie case of association between the appellant and the driver of the car was made out. I would allow the appeal and remit the case to the recorder.

DONOVAN, J.: In this case I thought initially, and it seems mistakenly, that counsel for the respondent was contending that mere presence in a car which had been taken and driven away without the owner's consent was evidence of complicity in the offence. I should find any such proposition unacceptable, but I understand the contention really to be that the presence of the appellant in the circumstances of this case raises a prima facie case against him of acting in concert with the other occupants. Those circumstances were the time, 2 a.m., the fact that the car was stationary, having run out of petrol; the fact that the appellant, who said that he was an innocent passenger who had been offered a lift, was making no attempt to resume his journey independently but was sitting very low in the rear seat with his feet outstretched and his head back; and the fact that none of the others in the car at any time spoke up for him in support of his story, as it would be natural to expect that they would have done, if the story were true. I agree that these circumstances, when taken together, did call for an answer on the appellant's part.

There has been some discussion whether the learned recorder decided as a matter of law that no prima facie case was disclosed or whether he decided that, as a question of fact, it was too weak a case to justify conviction. I think that the first of these alternatives represents the position, and I agree that the Case should go back to him with the direction proposed.

As regards the point raised this morning on the proviso to s. 28 of the Road Traffic Act, 1930, namely, that the recorder could be satisfied of the appellant's bona fides on the evidence given that the appellant alleged that he was an innocent passenger, the answer is that that is not what happened. The recorder treated this testimony as equivocal, and, accordingly, counsel for the appellant's argument on this matter is not, to my mind, of any weight.

SALMON, J.: The only doubt which I have felt in this case is what the learned recorder really did decide. This doubt springs from the somewhat nebulous way in which he has stated the Case. If, at the end of the case for the prosecution, he found that there was in law some evidence against the appellant but that it was not in his view strong enough to call for an answer, I, for myself, have grave doubts whether this court could have interfered. The recorder's view might have been mistaken, but it would not have been a mistake in law and, accordingly, would not have been a mistake that could successfully be challenged in this court. I have come to the conclusion, however, that, on a fair reading of the Case, the recorder decided that in law there was no evidence to support the charges. This, in my judgment, was a wrong conclusion on a point of law, since it is always a question of law whether there is or is not evidence. I do not propose to refer to the evidence, which has been stated by my Lord, save to say this. Test the matter in this way:—had the appellant been convicted at quarter sessions, any appeal based on the ground that there was no evidence to support the conviction would have been hopeless. I want to make it quite plain that I am not saying that the recorder was bound to convict on this evidence, although it certainly would not have been surprising if he had done so. In my opinion, however, there was clearly evidence for him to consider, and he misdirected himself in law in holding that there was no evidence for him to consider. On that ground I would allow this appeal.

Appeal allowed. Case remitted.

Solicitors: *Mitchells*; *Solicitor, Metropolitan Police.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

May 5, 1959

DEAN AND ANOTHER *v.* ASHTON-IN-MAKERFIELD DISTRICT AUDITOR

Local Government—District auditor—Refusal to surcharge—Appeal by aggrieved elector to Minister—Surcharge on direction from Minister—Right of appeal for persons surcharged—Right to apply for relief—Jurisdiction of High Court—Local Government Act, 1933 (23 *and* 24 *Geo.* 5, *c.* 51), *s.* 228 (1) (*d*), *s.* 229 (1), (3), *s.* 230 (1).

By the Local Government Act, 1933, s. 228 (1): "It shall be the duty of the district auditor at every audit held by him . . . (d) to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred . . ." By s. 229 (1): "Any person who is aggrieved by a decision of a district auditor . . . may, where the disallowance or surcharge or other decision relates to an amount exceeding £500, appeal to the High Court, and may in any other case appeal either to the High Court or to the Minister . . . (3) Where an appeal is made to the Minister under this section, he may at any stage of the proceedings, and shall, if so directed by the High Court, state in the form of a Special Case for the opinion of the court any question of law arising in the course of the appeal, but save as aforesaid the decision of the Minister shall be final." By s. 230 (1): "In the case of a surcharge, the person surcharged may, whether or not he appeals under the preceding section, apply to the tribunal (whether the High Court or the Minister) to whom he appeals or, if he does not appeal, to the tribunal (whether the High Court or the Minister) to whom he might have appealed, for a declaration that in relation to the subject-matter of the surcharge he acted reasonably or in the belief that his action was authorized by law, and the court or Minister, if satisfied that there is proper ground for doing so, may make a declaration to that effect."

An appeal does not lie to the High Court under s. 229 (1) against a surcharge made by a district auditor acting administratively on instructions of the Minister given pursuant to s. 229 (2), as all the rights of appeal given by s. 229 are rights of appeal from the acts of a district auditor done in the course of his judicial duties. A person so surcharged may, however, apply to the High Court for a declaration and relief under s. 230.

APPEAL from surcharge by district auditor, and applications for relief under s. 230 (1) of the Local Government Act, 1938.

A certificate of disrepair was prepared by the appellant, Frank Burrows, chief public health inspector of the Ashton-in-Makerfield Urban District Council and signed by the appellant, Frank Dean, clerk to the council, under s. 26 of the Housing Repairs and Rents Act, 1954, in respect of premises known as 1 Shaw Street, Ashton-in-Makerfield. That was done at a time when they had no authority to issue such a certificate, but it enabled the tenant of the premises to defeat an application for an increase in rent. When the landlord discovered that the certificate was invalid, he started proceedings and the district council had to expend £118 14s. 2d. to settle the claim. When the district auditor came to draw up his audit, an objection was raised by Robert Whitter, a local government elector, that those responsible for the issue of the certificate and the subsequent costs ought to be surcharged. The district auditor decided to the contrary, and Whitter, as a party aggrieved by that decision, appealed to the Minister of Housing and Local Government. The Minister, after holding an inquiry, decided that the sum was a loss or deficiency caused by the negligence or misconduct of the two appellants and a councillor named Hughes, and he remitted the matter to the district auditor with instructions to surcharge the

amount in equal proportions against those three persons. Dean and Burrows appealed to the Divisional Court and applied for relief under s. 230 of the Act of 1933. At the opening of the appeal objection was taken that the court had no jurisdiction to entertain either the appeal or the applications.

Stogdon for the clerk, Dean.

Rankin for the public health inspector, Burrows.

Hurle-Hobbs for the district auditor.

Cumming-Bruce for the Minister of Housing and Local Government.

The respondent Whitter, the aggrieved local government elector, did not appear.

LORD PARKER, C.J.: These proceedings come before the court by way of an appeal by Mr. Frank Dean, who is the clerk to the Ashton-in-Makerfield Urban District Council, and Mr. Frank Burrows, the chief public health inspector of that urban district council, against an alleged decision of the district auditor for the No. 2 Audit District which includes the urban district of Ashton-in-Makerfield whereby they were surcharged, together with one Richard Lloyd Hughes who does not appeal to this court, in the sum of £118 14s. 2d. They also apply for relief under s. 230 (1) of the Local Government Act, 1933.

The short facts, so far as they are necessary for the purposes of the preliminary point which has arisen, are these. Apparently a certificate of disrepair was prepared by the appellant, Frank Burrows, and signed by the appellant, Frank Dean, under the Housing Repairs and Rents Act, 1954, s. 26, in respect of premises, No. 1, Shaw Street, Ashton-in-Makerfield. That was done at a time when they had no authority to issue such a certificate of disrepair. That certificate of disrepair in the hands of the tenant of the premises enabled him to defeat an application for an increase in rent. When the landlord discovered, as he thought, that the certificate of disrepair was invalid, he started proceedings and the urban district council had to expend a certain amount of money, namely, in all, this sum of £118, before the claim was compromised. When the district auditor came to draw up his audit, an objection was made by a Mr. Whitter, a local government elector, that those responsible for the issue of that certificate of disrepair and the subsequent costs ought to be surcharged. The district auditor decided to the contrary, and thereon Mr. Whitter, as a party aggrieved by the decision of the district auditor, appealed to the Minister, the Minister in question being the Minister of Housing and Local Government. The Minister in due course, after holding an inquiry through his representative, decided that the £118 odd was a loss or deficiency caused by the negligence or misconduct of the three people whom I have mentioned, and he remitted the matter back to the district auditor with instructions to surcharge that amount in equal proportions against those three gentlemen. Two of them, Mr. Dean and Mr. Burrows, now appeal to this court against the surcharge which has now been made by the district auditor. The third gentleman, Councillor Hughes, has in fact appealed, as he claims he has the right to do, not to this court but to the Minister himself, and that appeal, as I understand it, is standing over until the decision of the court in the present case.

At the opening of the appeal objection was taken that this court had no jurisdiction in the matter; in other words, that the Minister's decision was final. It was also said that not only did this court have no jurisdiction in regard to entertaining an appeal, but also it had no jurisdiction to entertain an application for relief under s. 230.

It is necessary now to look at a few sections of the Act in order to see the scheme. Matters of accounts and audit are dealt with in Part 10 of the Local Government

Act, 1933. Provision is made for the appointment of district auditors, for the audit of accounts by the district auditor and for the deposit of accounts. By s. 226 it is provided:

> " (1) A local government elector for the area to the accounts of which the audit relates may be present or may be represented at the audit and may make any objection to the accounts before the auditor.
>
> " (2) The district auditor shall, on the application of any person who is aggrieved by his decision on any matter with respect to which that person has made an objection, or of any person aggrieved by a disallowance or surcharge made by the auditor, state in writing the reasons for his decision."

It was pursuant to that section that Mr. Whitter objected at the audit that the district auditor ought to have made a surcharge of this sum of £118. The district auditor, having refused to do so, was required to and did state in writing the reasons for his decision. Then by s. 228 (1): " It shall be the duty of the district auditor at every audit held by him ", and there follow some six items of what he shall do. It is sufficient to refer to only two or three of them. It is his duty

> " (a) to disallow every item of account which is contrary to law; (b) to surcharge the amount of any expenditure disallowed upon the person responsible for incurring or authorising the expenditure; . . . (d) to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred."

Pausing at para. (d), which is the relevant one in this case, it seems to me that the district auditor has to come in the course of the audit to certain decisions; he has to decide in the case of an objection whether it is valid or not, and he has to decide under s. 228 whether any sum has to be disallowed or surcharged under any one of the paragraphs to sub-s. (1) of that section. Section 229 goes on in this way:

> " (1) Any person who is aggrieved by a decision of a district auditor on any matter with respect to which he made an objection at the audit [that in this case would be Mr. Whitter] and any person aggrieved by a disallowance or surcharge made by a district auditor may, where the disallowance or surcharge or other decision relates to an amount exceeding £500, appeal to the High Court, and may in any other case appeal either to the High Court or to the Minister.
>
> " (2) The court or Minister on such an appeal shall have power to confirm, vary or quash the decision of the auditor, and to remit the case to the auditor with such directions as the court or Minister thinks fit for giving effect to the decision on appeal, and if the decision of the auditor is quashed, or is varied so as to reduce the amount of the surcharge to £500 or less, the appellant shall not be subject to the disqualification by reason of the surcharge imposed by Part 2 of this Act, or by the corresponding provision of any enactment relating to London.
>
> " (3) Where an appeal is made to the Minister under this section, he may at any stage of the proceedings, and shall, if so directed by the High Court, state in the form of a special case for the opinion of the court any question of law arising in the course of the appeal, but save as aforesaid the decision of the Minister shall be final."

The preliminary point taken arises on those sections to which I have referred. It is said that in this case the surcharge that in fact was physically made by the district auditor as a result of directions made by the Minister was not made by him within the meaning of sub-s. (1), and that therefore an appeal will not lie

by the party aggrieved to the High Court or to the Minister. It is also said that in any event Mr. Whitter having gone to the Minister, as he was entitled to as a person aggrieved by the district auditor's refusal to comply with his objection, and the Minister having determined it, the Minister's decision by virtue of sub-s. (3) is final, and that accordingly there is now no appeal to this court. The point comes down to a very narrow question: what is meant in sub-s. (1) by the expression " any person aggrieved by a surcharge made by a district auditor " ? Does that include a surcharge made, as in this case, at the direction of the Minister, or is it to be confined to a surcharge made pursuant to the district auditor's duty under s. 228 ?

The first thing to observe is that once the district auditor has come to his necessary decisions and the audit is made, he is functus officio so far, at any rate, as his judicial duties are concerned and his only duties thereafter are such as can be found in the statute, which in this case is to obey a direction of the Minister, if the matter has been before the Minister, or of the court, if the matter has been before the court. That seems to me to be an administrative duty as opposed to a judicial duty. Looking at s. 229 it seems to me that all the rights of appeal there set out are rights of appeal from what the district auditor has done in the exercise of his judicial duties. Thus the opening clause

> " Any person who is aggrieved by a decision of a district auditor on any matter with respect to which he made an objection at the audit "

is clearly referring to, and can only refer to, the decision that is made under s. 226 in the course of the exercise of his judicial function. Similarly, it seems to me that a disallowance or surcharge made by the auditor is again referring to what he has done pursuant to s. 228 in the exercise of his judicial duty. Indeed, the very words which follow assimilate the disallowance or surcharge to a decision because it says " may, where the disallowance or surcharge or other decision relates to an amount exceeding £500 ", thereby clearly showing that appeals in that subsection are appeals from decisions or actions taken in the course of his judicial duties.

Subsection (2) really points to the same conclusion where it says that

> " The court or Minister on such an appeal shall have power . . . to remit the case to the auditor with such directions as the court or Minister thinks fit for giving effect to the decision on appeal ",

that is the decision of the Minister or of the court. Contrast that with the following words " and if the decision of the auditor ", because it says " and if the decision of the auditor is quashed, or is varied ", then certain things follow. On that short ground alone, as a pure matter of construction, there is no appeal to this court in the circumstances of this case where the only surcharge made was one by the district auditor administratively on the directions of the Minister.

However, the matter does not rest there because, as I have already said, sub-s. (3) provides that subject to a special case the decision of the Minister shall be final. If those words do not mean what they say, the position would be rather extraordinary. There would be in a sense no end to the possibilities of litigation and the absurdities that would arise. Take the present case. Mr. Whitter, instead of appealing as a person aggrieved to the Minister, might have appealed to this court and this court might have done what the Minister did. Is it then to be said that these appellants could go to the Minister and in effect ask the Minister to reverse the decision arrived at by this court ? It seems to me the words " the decision of the Minister shall be final " mean what they say. It is

said: but that only means final as between the appellant in this case, Mr. Whitter, and, I suppose, the district auditor and possibly the local authority. The decision whether Mr. Whitter's objection is right and whether the appellants are liable to be surcharged is really all one and indivisible, and it seems to me that sub-s. (3) is an added reason for saying that there can be no appeal in this case. It is said, and said with some force, by counsel for the appellants Mr. Dean and Mr. Burrows that no machinery is specifically laid down for the people liable to be surcharged to appear before the Minister or his representative to defend themselves, or to be represented by counsel and matters of that sort. It is curious that there is no provision made in the Act itself or by rules to that effect, but the words of s. 229 are much too clear to be influenced by considerations of that sort. I have no doubt myself that at such an inquiry the Minister should, and no doubt does, take every possible step to see that those on whom the surcharge may fall will be present, will hear the accusations made against them and will in effect be able to defend themselves. So much for the appeal.

As regards the application for relief, that depends on the wording of s. 230 (1) which is in these terms:

> " In the case of a surcharge, the person surcharged may, whether or not he appeals under the preceding section, apply to the tribunal (whether the High Court or the Minister) to whom he appeals or, if he does not appeal, to the tribunal (whether the High Court or the Minister) to whom he might have appealed, for a declaration that in relation to the subject-matter of the surcharge he acted reasonably or in the belief that his action was authorised by law, and the court or Minister, if satisfied that there is proper ground for doing so, may make a declaration to that effect."

The important words there are that if the person surcharged does not appeal, he may apply to the tribunal, whether the High Court or the Minister " to whom he might have appealed ". Counsel for the appellant Dean, the clerk, took up the attitude at the outset, an attitude that helped him really on his construction of s. 229, that if he did not have a right of appeal under s. 229, he was also debarred from appealing under s. 230 because he was not a person who might have appealed, and he invoked that argument for saying, therefore, that the construction which I have just suggested as the correct construction of s. 229 must be wrong because it would be a most extraordinary position if a man in these circumstances not only had no right of appeal but no right of claiming relief. It was said on the other side, not by the Minister but on behalf of the district auditor, that not only was there no right of appeal, but that there was no right of application, again because of those words " to whom he might have appealed ". I cannot think that those words in this subsection were ever intended to provide a condition which, if not complied with, debarred a man from relief. What the subsection is doing is to try to identify the tribunal to whom the application is to be made, whether it is the High Court or the Minister. Which it is depends on the amount of the surcharge: if the amount of the surcharge is over £500, then the application has to be made to the High Court; if it is under £500, it can be made either to the Minister or to the High Court. Accordingly I think that those words " to whom he might have appealed " are not intended to be a condition of an application being made, but are intended merely to identify the particular tribunal that the application has to be made to; in other words, the tribunal to whom, if there was a right of appeal, he would have appealed.

In my view the present appellants have a right to apply to this court for relief under s. 230. The question whether, when a surcharge is being made pursuant to s. 228 (1) (d), it is possible to say that the applicant has acted reasonably or in

the belief that his action was authorised by law is a matter which the court at this stage does not decide. It is enough to say that there is jurisdiction to entertain an application. Whether it is possible for the applicants to bring themselves within those words, having regard to the nature of the surcharge, is a matter which will fall to be determined later.

DONOVAN, J.: I agree and for the same reasons.

SALMON, J.: I agree. I only desire to add this. The persons surcharged (the appellants Mr. Dean and Mr. Burrows and Mr. Hughes) were present at an inquiry held by the Minister's representative and it is not suggested, and could not be suggested, that they were denied the right of putting forward anything which they desired to put forward on their behalf. In the unlikely event of an inquiry of this sort being held and the Minister's representative denying a person, against whom allegations of negligence are being made, the right to be heard in his own defence, I am far from satisfied that such a person would not have any remedy in this court. I am convinced, however, that that remedy would not be by way of appeal under s. 229.

[Their Lordships then heard applications for relief made under s. 230 (1) of the Local Government Act, 1933, which they dismissed because, on the facts they were not satisfied that either applicant acted reasonably or in the belief that his actions were authorised by law.]

Appeals and applications dismissed.

Solicitors: *J. G. Haley; Jaques & Co.*, for *Barker & Midgley*, Blackpool; *Solicitor, Ministry of Housing and Local Government.*

T.R.F.B.

CROWN COURT AT LIVERPOOL

(JUDGE LASKI)

March 10, 17, 1959

R. *v.* CAMPBELL

Criminal Law—Trial—Postponement—Committal to Crown Court on charge of felony—Absence of prosecutor from England—Case twice respited to next session on application of Crown—Third application by Crown—Right of accused to be discharged—Habeas Corpus Act, 1679 (31 *Car.* 2 *c.* 2), *s.* 6.

In December, 1958, the defendant was committed to the Crown Court at Liverpool on a charge of robbery with aggravation, contrary to s. 23 (1) (a) of the Larceny Act, 1916. The court, which was set up under the Criminal Justice Administration Act, 1956, s. 1, sat at least eleven times a year. As the complainant, a seaman, was not in the country when the case came before the court in January, 1959, an application by the Crown to respite the case to the next session was granted and the defendant was released on bail. A similar application was granted when the case came before the court in February, 1959, and the defendant was allowed to remain on bail. When the case again came before the court in March, 1959, the Crown applied for the case to be further respited as the complainant would not be back in England until July, 1959. On the question whether the defendant was entitled to be discharged under s. 6 of the Habeas Corpus Act, 1679,

HELD: the benefit of s. 6 of the Habeas Corpus Act, 1679, depended on the observance of the procedural conditions precedent set out in the section, and, as these had not been complied with, the defendant was not entitled to be discharged under the section, but, in the exercise of the court's discretionary power, an order would be made that the case should lie on the file and not be further proceeded with without an order of the court.

APPLICATION by the Crown to respite further the trial of the defendant, who had been committed to the Crown Court at Liverpool on a charge of robbery with aggravation, contrary to s. 23 (1) (a) of the Larceny Act, 1916. The case had already been twice respited to the next session of the court on the ground that the complainant, a seaman, was not in the country. As the complainant would not be in England until July, 1959, the Crown applied for a ruling whether application should be made each session for the case to be respited to the next following session until July was reached.

By s. 6 of the Habeas Corpus Act, 1679: "Provided alwayes . . . that if any person or persons shall be committed for high treason or fellony plainely and specially expressed in the warrant of committment upon his prayer or petition in open court the first weeke of the terme or first day of the sessions of oyer and terminer or generall goale delivery to be brought to his tryall shall not be indicted sometime in the next terme sessions of oyer and terminer or generall goale delivery after such committment it shall and may be lawfull to and for the judges of the Court of Kings Bench and justices of oyer and terminer or generall goale delivery and they are hereby required upon motion to them made in open court the last day of the terme sessions or goale delivery either by the prisoner or any one in his behalfe to sett at liberty the prisoner upon baile unlesse it appeare to the judges and justices upon oath made that the witnesses for the King could not be produced the same terme sessions or generall goale delivery. And if any person or persons committed as aforesaid upon his prayer or petition in open court the first weeke of the terme or first day of the sessions of oyer and terminer or generall goale delivery to be brought to his tryall shall not be indicted and tryed the second terme sessions of oyer and terminer or generall goale delivery after his committment or upon his tryall shall be acquitted he shall be discharged from his imprisonment."

G. J. Bean for the Crown.
Dovener for the defendant.

Cur. adv. vult.

Mar. 17. **JUDGE LASKI:** On Dec. 11, 1958, Campbell and two others, man and wife, were committed to this court by the Liverpool magistrates on a charge of robbery with aggravation at Liverpool of one John Ball on Dec. 7, 1958, contrary to s. 23 (1) (a) of the Larceny Act, 1916. The married pair pleaded guilty and have been sentenced by me. It is the position of Campbell with which I have to deal. Campbell came before me at the January, 1959, session of this court. Application was made to respite the case to the February session as the complainant, a seaman, was out of the country. I granted this application and gave bail to Campbell. At the February sitting of this court a similar application was made for the same reason and I respited the case to this session, Campbell remaining on bail. An application has been made to me further to respite this case and I have been informed that the complainant will not be in this country until July.

The Habeas Corpus Act, 1679, was cited to me as having immediate relevance to the instant case, and I was referred to ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE (34th Edn.), para. 241 to para. 243, as providing an adequate simplified summary of the meaning of s. 6 of that Act. Under the Assizes Relief Act, 1889, s. 3, if a person committed for trial at sessions is not tried at the next sessions, the next court of assize may *on his application* try or discharge him or release him on bail, unless the delay is due to special reasons, such as the impossibility of producing the witnesses for the Crown (s. 3 (1) and s. 3 (3)). If the next court of quarter sessions has not tried him before the

next subsequent assizes, the judge of assize must try or discharge him (s. 3 (2)). The offence in respect of which Campbell is indicted is not triable at quarter sessions: see the Quarter Sessions Act, 1842, s. 1.

The court in which I sit is a Janus-like hybrid in that, under s. 1 (1) of the Criminal Justice Administration Act, 1956, it has functions

> ". . . for the purpose of exercising such jurisdiction as is commonly conferred on courts of assize by the commissions of oyer and terminer and of gaol delivery . . ."

and in that capacity it is known as " the Crown Court at Liverpool " (s. 1 (1) (a)), and, under s. 3 of the same Act, it has additional jurisdiction as a court of quarter sessions for Liverpool. It is clear that I must deal with this matter in the context of s. 1 of the Act constituting this court.

The Central Criminal Court was constituted by the Central Criminal Court Act, 1834. It took the place of the former sessions at the Old Bailey which had been held from very early times under special commissions of gaol delivery for Newgate and of oyer and terminer for the City of London and the County of Middlesex. The court now sits under a general commission of gaol delivery and oyer and terminer and has power to proceed thereunder until the commission is renewed (s. 2). The court sits twelve times each year. In these respects the Central Criminal Court is in pari materia with this court. The Central Criminal Court is part of the High Court of Justice: see the Supreme Court of Judicature (Consolidation) Act, 1925, s. 18 and s. 70, and see also 9 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 407, note (g). It is a court of assize also: see the Interpretation Act, 1889, s. 13 (4). In my view, the definition of " court of assize " in that subsection would include this court.

I now turn to a consideration of s. 6 of the Habeas Corpus Act, 1679. After reading that section with care and frequency, I do not feel that it is as easily construed as the simplicity of the explanation in ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE would suggest. It is true that SIR WILLIAM HOLDSWORTH in his HISTORY OF ENGLISH LAW, Vol. 9, p. 118, also gives a very simple summary of s. 6, but he fails, in my respectful opinion, to note the procedural conditions precedent, which find an echo in the Assizes Relief Act, 1889, s. 3.

It must be remembered that the Habeas Corpus Act, 1679, is an old Act, conditioned in its terms by the law and procedure of its day. I have found an anonymous case, *Anon* (1), heard in " Termino Sancti Hillarii, Anno 31 & 32 Car. 2 in Banco Regis ", that is to say, in the King's Bench in Hilary Term of 1680, within a year after the passing of the Act. The report runs as follows:

> "A person who was committed to the Tower for conspiring the death of the King, was brought up by habeas corpus, and prayed to have bail taken, unless an indictment were found against her this term, according to the new Act of 31 Car. 2 for habeas corpus's. The court said, that they which would have the benefit of that Act, must pray it before the first week of the term expires; but in regard it appeared, that she had prayed it before by her counsel, and her habeas corpus was taken out in time, the court said, the benefit of the Act should be saved to her, for the prayer is not necessary to be made in person, but Mr. C. G. was refused the advantage, he having omitted to make the prayer during the first week, either in person or by counsel."

In STATUTES AT LARGE, Vol. 8, edited by DANBY PICKERING and published in Cambridge in 1763, the Act is printed at p. 432 et seq. The present notation,

(1) (1680), 1 Vent. 346.

consecrated by the official STATUTES OF THE REALM, of the relevant section is 6; in STATUTES AT LARGE it is 7. It is clear that *Anon* (1) was regarded as good law, as it is therein marginally cited (STATUTES AT LARGE, Vol. 8, at p. 436). I do not regard *R.* v. *Bowen* (2) as of great value to me but it shows, by reason of the careful argument of Mr. Greaves of counsel on behalf of the prisoner in that case that at that date also it was recognised that the benefit of the Act of 1679 depended on the observance of certain procedural conditions precedent. It may be that in the conditions of today it is difficult, if not impossible, to comply with the requirements of the statute. That may be an argument of validity and force for amending or reconstructing the law of habeas corpus, but today I must construe the Act of 1679 as it is. In the first place, this application is made to me by the Crown and not by the prisoner. In the second place, I hold that the procedural conditions precedent of s. 6 of the Act of 1679 have not been complied with. In these circumstances I hold that no case exists for the application of the Act of 1679. The preamble to the Act of 1679 makes clear the abuses aimed at—abuses which do not obtain in modern times. It is perhaps not improper to add that the decision of WILLIAMS, J., in *R.* v. *Bowen* (2) seems to accord with the common sense of the matter, albeit no reasons are given and it is not easy to follow the phrases "human law" and "humanly interpreted".

I have looked at *R.* v. *Oliver* (3), which was cited to me. That case does not appear to me to assist in this matter. Despite my researches I can find no evidence of a matter arising in pari materia with the present matter and from which, in terms of its treatment aliunde, I could gain guidance. I note with interest that in the learned article on habeas corpus which appears in the ENCYCLOPAEDIA OF THE LAWS OF ENGLAND (2nd Edn.), Vol. 6, p. 468 et seq., it is stated at p. 471:

> "At the present day, indeed, the writ of habeas corpus is almost invariably issued by virtue of the common-law jurisdiction, and not under the statute."

In the present case, however, the defendant, Campbell, is not without remedy. I conceive myself within the law to have a discretionary power to give a direction as to the future of this matter. In my opinion, the justice of the case will be met if I order that this case lie on the file and be not further proceeded with without an order of the court.

Order accordingly.

Solicitors: *Town Clerk*, Liverpool; *K. Maxwell Brown*, Liverpool.

G.F.L.B.

(1) (1680), 1 Vent. 346.
(2) (1840), 9 C. & P. 509; 173 E.R. 933.
(3) 122 J.P. 24; [1957] 3 All E.R. 669; [1958] 1 Q.B. 250.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

May 7, 8, June 5, 1959

R. *v.* BARNSLEY LICENSING JUSTICES. *Ex parte* BARNSLEY AND DISTRICT LICENSED VICTUALLERS' ASSOCIATION AND OTHERS

Magistrates—Bias—Licensing—Application for off-licence by co-operative society—Magistrates or spouses with small interests in society by way of shares and loan deposits—No real likelihood of bias—Objection on ground of bias to be taken at hearing—No duty of advocate to question magistrates on suspected facts—Licensing Act, 1953 (1 & 2 *Eliz.* 2, *c.* 46), *s.* 48 (4) (5).

By s. 48 (4) of the Licensing Act, 1953: "No justice shall act for any purpose under this Act in a case that concerns any premises in the profits of which he is interested . . ." By subs. (5): "No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification . . ."

The effect of s. 48 (5) is to oust the common law rule laid down in *R.* v. *Rand* (1866), 30 J.P. 293, and an applicant for certiorari on the ground of bias must now prove a real likelihood of bias, whether by reason of pecuniary interest or otherwise.

So *held* by LORD PARKER, C.J., and DONOVAN, J., SALMON, J., dissenting.

An objection that a justice is disqualified from sitting should be taken at the hearing; but there is no duty on the part of an advocate, if he merely thinks it possible that grounds of disqualification may exist but has no definite knowledge, to put fishing questions to members of the Bench in an endeavour to ascertain whether such grounds do exist.

APPLICATION for order of certiorari.

On Feb. 12, 1959, the Barnsley licensing justices heard an application by Robert Murray, of the Barnsley British Co-operative Society, Ltd., for a justices' off-licence at the Central Drug Department, Wellington Street, Barnsley. The application was opposed by the Barnsley and District Licensed Victuallers' Association and the Barnsley and District Off-Licence Holders' Protection Association (the present applicants). The hearing was adjourned to Mar. 5, 1959, when the application was granted. On the earlier occasion of the seven justices who sat five were members of the co-operative society and two were not, but the spouses of these two were members. Of the total of seven justices sitting when the application was granted, six were members of the co-operative society and one was not, but her husband was. Six of the seven justices had sat on the earlier occasion. There was only one borough justice in Barnsley of whom it could be said that neither he nor his near relative was a member. The justices concerned had small interests in the society by way of shares and loan deposits. All the members of the licensing committee had duly disclosed their interests before their appointment. The present applicants obtained leave to apply for an order of certiorari to bring up and quash the justices' order, the ground being bias on the part of the justices, though it was not alleged that they had acted dishonestly or were in fact biased. The allegation was that their membership of the society or the membership of their spouses which attracted financial benefits constituted bias in law.

H. C. Beaumont for the applicants for certiorari.

John McLusky for the society, the grantee of the licence.

Cur. adv. vult.

June 5. The following judgments were read.

LORD PARKER, C.J.: The following is the judgment of **DONOVAN, J.,** and myself.

Counsel for the applicants moves in this case for an order of certiorari to bring up and quash a decision of the licensing justices for Barnsley given on Mar. 5, 1959, whereby they granted an application by the Barnsley British Co-operative Society, Ltd. (hereinafter called " the society ") for a spirits off-licence at their central drug department in Barnsley. The society already holds a wine licence for the same premises.

There were two hearings in this matter. At the first on Feb. 12 the justices apparently heard evidence and adjourned. Of the seven justices who then sat, five were members of the society and two were not. The spouses of these two justices were, however, members. At the second hearing when the application was granted seven justices sat, of whom six had sat on Feb. 12. Of the total of seven justices, six were members and one was not. The husband of this one justice was, however, a member. The membership of the society is apparently so large and comprehensive that there is only one borough justice in Barnsley who (or whose near relative) is not a member, and that justice is a member of Parliament.

The ground on which the court is asked to quash the grant of a licence is that of bias on the part of the justices. It is not said that they acted dishonestly in any way or that they were in fact biassed, but that their membership of the society (or the membership of their spouses), which attracts financial benefits, constitutes bias in law. We are told that for the year ended Nov. 18, 1958, the total turnover of the society was some £12,000,000. Of this £46,000 only represented the proceeds of the sale of wine, spirits and other liquor, i.e., 0.36 per cent. of the total turnover. It is estimated that the new spirits licence will increase the trade by no more than £3,000 per annum. The justices concerned have small interests in the society by way of shares and loan deposits. The highest income that any one of them derived from these combined sources in the year ended November, 1958, was £23.

The position of justices having a financial interest in concerns which brew or distil or sell intoxicating liquor has been the subject of specific provisions in various Licensing Acts during the last century (see s. 60 of the Licensing Act, 1872, s. 40 of the Licensing (Consolidation) Act, 1910, and now s. 48 of the Licensing Act, 1953). One may summarise the effect of the first four subsections of s. 48 as follows: subsection (1) disqualifies a justice from acting for any purpose under the Act in the county or borough in question, or from being a member of the licensing committee for that county or borough, who is, individually or in partnership, a brewer or distiller or retailer of intoxicating liquor in that county or borough. Subsection (2) disqualifies a justice from being a member of the licensing committee or the confirming or compensation authority for that county or borough if he is a shareholder or stockholder in a company which brews or distils or retails intoxicating liquor in that county or borough, unless before appointment or re-appointment he discloses his interest to the appointing justices. In fact all the members of the licensing committee had duly disclosed their interests before their appointment. Subsection (3) provides that a person who has a beneficial holding of such shares or stock as aforesaid shall not be appointed or re-appointed a member of such committee or authority as aforesaid, unless the justices appointing him or re-appointing him are satisfied that the extent to which the company carries on the business of brewing, distilling or retailing intoxicating liquor is so small in relation to its whole business that

the interest of the person concerned affords no reasonable ground for suggesting that he is not a proper person to be a member of the committee or authority. Then comes sub-s. (4) dealing with a case where a justice is interested in specific premises. It provides as follows:

> "No justice shall act for any purpose under this Act in a case that concerns any premises in the profits of which he is interested, or of which he is wholly or partly the owner, lessee, or occupier, or for the owner, lessee, or occupier of which he is manager or agent: Provided that a justice shall not be disqualified under this provision by reason of his having vested in him a legal interest only, and not a beneficial interest, in the premises concerned or the profits of them."

Accordingly, whatever may be the position under sub-s. (2) and sub-s. (3), a person having such a beneficial interest in the premises as sub-s. (4) prescribes may not act for any purpose under the Act in a case which concerns those premises. In its context in sub-s (4) the reference to profits of the premises is clearly, we think, an elliptical way of describing profits arising from any trade in making or selling intoxicating liquor carried on from the premises. Accordingly, the justices in the present case who were members of the society were in our view disqualified from acting under sub-s. (4).

Pausing there, it is said, and this we think is undoubtedly true, that certiorari would lie. As was said by BLACKBURN, J., in *R.* v. *Rand* (1):

> "There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter . . ."

Indeed, this is a rule of law and not a matter merely giving rise to a presumption of bias. Thus in *R.* v. *Sunderland JJ.* (2), VAUGHAN WILLIAMS, L.J., said:

> "If he [i.e., a justice] has personally a pecuniary interest or an interest capable of being measured pecuniarily, the law raises a conclusive presumption of bias. For reasons of policy, which hardly require explanation, it is not thought convenient, where there is such an interest, to go into the question whether he in fact acted partially or impartially. A bias is presumed from the mere fact of the existence of the interest."

The matter, however, does not rest there because sub-s. (5) of s. 48, so far as it is relevant, provides that:

> "No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification . . ."

Counsel for the applicants contends that this subsection in no way affects the grounds on which certiorari will lie. It is only, he submits, a provision to ensure that unless and until the decision granting the licence is set aside, it shall remain and be treated as valid. Counsel for the respondents, on the other hand, contends that its effect is to oust the remedy by way of certiorari on the ground of pecuniary interest, be that interest large or small. Only in the event of the likelihood of bias arising, otherwise than from pecuniary interest, will certiorari lie.

In our judgment, neither of these submissions is correct. All the subsection does is to oust the rule of law enunciated in *R.* v. *Rand* (1) and to require an applicant for certiorari to prove a real likelihood of bias, whether by reason of pecuniary interest or otherwise. Indeed, this view has already been taken by this court in

(1) (1866), 30 J.P. 293; L.R. 1 Q.B. 230.
(2) 65 J.P. 598; [1901] 2 K.B. 357.

considering the corresponding provision in s. 60 of the Licensing Act, 1872. Thus in *R.* v. *Tempest* (1), LORD ALVERSTONE, C.J., said:

> "Then remains the further point, which is not without difficulty. The fourth magistrate who was present at the confirming sessions appears to have a share in Allsopps, and it is not disputed he comes within the opening words of s. 60. The point we have to consider is whether the licence is bad because he adjudicated upon it notwithstanding the provisions of that section. The true meaning of the proviso at the end of that section is not without difficulty. The words are: 'No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid'. It was argued by Mr. Hextall that comparing that with the analogous provision in s. 38, it meant to say that no objection should be taken to the sale of liquor in that case, acting under the licence, and if the question had arisen solely under s. 38, I think that there would be some ground for that argument. But when you look at the actual language of s. 60, which creates the status of disqualification, it says that: 'No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid'. In my opinion it is impossible to put such a limited construction as that contended for. I think the words of the Act here occurring in the proviso to a section creating a disqualification against the doing of the act, and creating a penalty, cannot be construed so narrowly; that is to say, that the act was not intended to be protected if that was the only disqualification. I would further point out that this proviso would be no protection where a case of actual bias was raised—where it is said that the interest of the brewer is such that he would be biassed. In that case, of course, the section would not be wanted, but it is quite plain to my mind that the section saying 'by reason only of such disqualification' means thereby what I may call the technical disqualification created by the Act. But if any brewer was to sit, and the case made was that he was biassed in fact, or likely to be biassed in fact, different considerations would arise. Under all the circumstances I think neither of the objections are successful, and the rule must be discharged."

DARLING, J., and CHANNELL, J., agreed.

The judgment of PALLES, C.B., in *R.* v. *Kilkenny JJ.* (2), is to the same effect: see also the judgment of the court (FIELD, J., and CAVE, J.) in *R.* v. *Handsley* (3) on a somewhat similar provision, in which the following passage occurs:

> "Feeling ourselves thus at liberty to exercise our own judgment in the matter, we are of opinion that in cases like the present where such a section as s. 502 of this local Act exists, it is not enough to show merely that an adjudicating justice is a member of the town council, and, as such, has a pecuniary interest in the result of the complaint or information . . . but that in order to disqualify the justice it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter."

Accordingly, it seems to us that certiorari cannot issue in this case unless there is proved a real likelihood of bias whether arising from a substantial pecuniary interest or otherwise. Here there is no suggestion of the likelihood of bias arising otherwise than from pecuniary interest. Apart from the small interest payable on any shares or deposits, the justices who were members of the society could, it is said, look forward to buying their spirits more cheaply than in an ordinary

(1) (1902), 66 J.P. 472.
(2) (1908), 42 Ir. L.T. 134.
(3) (1881), 46 J.P. 119; 8 Q.B.D. 383.

retail shop if they so wished. What happens, of course, is that at the end of the accounting period, a member of a Co-operative Society receives out of the profits of the society a dividend calculated not on shareholding, but on total purchases. The same effect is thus to reduce the cost of those purchases. Can it then be said that this financial interest is so substantial as to give rise to a real likelihood of bias? In our judgment, it cannot. The total increase in trade which is anticipated to arise is, as stated above, only £3,000 per annum on a total turnover of £12,000,000. It is true that, if the justices made purchases of spirits, they would get the eventual rebates on those purchases. But here we do not know whether or to what extent any justice was a drinker of spirits. Finally, and this we think is conclusive, the society in fact have another branch only two hundred and fifty yards away from the premises in question which already has a spirits licence. All the justices, therefore, were already in a position to get a rebate on purchases of spirits. Indeed, the application for certiorari has been rested on the view, which we have held to be wrong, that bias is to be conclusively presumed from the existence of the justices' pecuniary interest, and from nothing else. It was not contended that there was any risk of bias because of the size of their interest or because of any other ground. In the course of argument, however, counsel for the applicants did accept a suggestion, which fell from SALMON, J., that the opportunity to buy spirits at what in effect is a discount, might import a real risk of bias. With this we have already dealt.

Before leaving this part of the case, it should be mentioned that counsel for the applicants relied on the principle that the right to apply for certiorari on the ground of lack of jurisdiction can only be taken away by express words. In the present case, however, it is not a case of the statute purporting to oust the remedy, but of the statute investing a justice with jurisdiction which he would not otherwise have had.

There remains a point taken by counsel for the society. The solicitor for the applicants, who opposed the application before the justices, has stated that before the application he thought it possible that some members of the bench were members of the society. So much so that he informally approached the clerk to the justices beforehand, who told him that such membership would not disqualify the justices from sitting. After the application was granted, the said solicitor deposes that from inquiries which he made he is satisfied that the chairman of the bench was a member of the society and that to the best of his knowledge other members of the licensing committee were also members. Counsel for the society argues that it was the duty of the said solicitor to confirm his suspicions at the hearing by asking the justices which of them was a member of the society, and, if he so wished, to make formal objection then. Since he failed to do so, he ought not to be allowed to take objection now.

It is true there is ample authority for the proposition that if an advocate has knowledge that a particular justice is or may be disqualified from sitting on a particular application, he should take the objection then and there and not, so to speak, keep it up his sleeve for future use, if necessary, in this court. It is not possible to say that this is such a case. No attack on the bona fides of the solicitor in question is here made; indeed, a tribute has been paid by the society to his integrity. Whatever he may have thought, it cannot be said that he had knowledge. Nor is there, so far as the court knows, a public register of members that he could consult. " Means of knowledge " does not include for this purpose the opportunity to put fishing questions to each member of the bench, which he might or might not answer. And, indeed, it would be an invidious task to force on an advocate. In our view, there is no substance in this alternative argument for the respondents. Accordingly, we would refuse the application.

SALMON, J.: I have the misfortune to differ from my Lords in the conclusions which they have reached in this case. At the beginning of this year the society was minded to extend its business by the sale of spirits at its central drug department in Wellington Street, Barnsley. To this end an application was made on its behalf for a spirits off-licence for those premises. At a meeting of the licensing justices for the county borough of Barnsley held on Mar. 5, 1959, this application was granted. Seven justices sat at this meeting. Six of them were shareholders in, and members of, the society, and thereby admittedly disqualified from acting. The husband of the remaining justice was a shareholder in, and member of, the society. It will thus be seen that there was not even a quorum of qualified justices, as required by s. 4 of Part 1 of sched. 1 to the Licensing Act, 1953. The chairman of the meeting was Alderman A. E. McVie. In July, 1958, he had presented himself for election to the board of directors of the society. There were then two vacancies on the board. Alderman McVie was third amongst the nine unsuccessful candidates. None of the justices disclosed his interest to the present applicants at or before the meeting of Mar. 5, 1959. The application was opposed by the present applicants, the Barnsley & District Licensed Victuallers' Association and the Barnsley & District Off-Licence Holders' Protection Association. They submitted that there were adequate existing facilities for the sale and purchase of intoxicating liquor in the neighbourhood of the society's central drug department. There were in fact fourteen fully licensed or full off-licensed premises within two hundred and fifty yards (including one of the society's off-licensed premises) and two further full off-licensed premises within four hundred and seventy-five yards of these premises. The applicants, no doubt, pressed their objection because they regarded the society as a particularly serious trade competitor. Intoxicating liquor, in common with everything else in which the society trades, is sold by the society to its members in effect at a discount below ordinary retail list prices. This discount is not deducted at the time of each individual sale, but is paid to the member annually on the total amount of his purchases. It is true that the payment is described as a dividend and that the member could not receive it, nor indeed be a member of the society, unless he were a shareholder. The amount of the payment, however, is in no way referable to the size of the member's shareholding; it is calculated solely as a percentage of the member's purchases from the society. It is, in reality, whatever it may be called, a discount. The current rate of discount is seven and a half per cent.

The present applicants argue in this court that the decision of the justices should be quashed on the ground of bias. In order for them to succeed it is not necessary for them to go as far as proving actual bias. On the other hand, the authorities plainly establish that it would not be enough for them to show only a bare possibility or a mere suspicion of bias. In order successfully to impugn the decision of the justices, a real likelihood of bias must be established. Quite apart from the common law presumption of bias from any pecuniary interest, with which I will deal presently, how is this onus to be discharged? In my judgment, by establishing that there are real grounds on which ordinary right-thinking people might reasonably conclude that the decision may well have been biassed. In such circumstances justice would not manifestly be seen to be done. The doctrine that justice must not only be done but manifestly be seen to be done was enunciated by LORD HEWART, C.J., in *R.* v. *Sussex JJ., Ex p. McCarthy* (1), but its roots are deep in legal history. As this court has pointed out in *R.* v. *Camborne JJ., Ex p. Pearce* (2) the doctrine has all too frequently been

(1) 88 J.P. 3; [1924] 1 K.B. 256.
(2) 118 J.P. 488; [1954] 2 All E.R. 850; [1955] 1 Q.B. 41.

invoked in attempts to quash convictions or invalidate orders on the flimsiest pretexts of bias. The fact, however, that the doctrine has sometimes had dubious champions does not in any way detract from its validity or diminish its importance, which is fundamental.

The present applicants now know that the justices by granting the licence obtained the advantage of being able to buy a bottle of gin at about 2s. 6d. and a bottle of whiskey at about 2s. 9d. below the retail list prices at the society's central drug department. It may be argued that the sum involved is small, but to any ordinary mortal the advantage is a very real one. The fact that it can also be enjoyed at the society's other premises two hundred and fifty yards away does not in my judgment by any means destroy its significance. It is true that it is not certain whether or to what extent any justice is a drinker of spirits; nor could such a matter be inquired into. In my view, one may reasonably draw the inference that, at any rate, some of the justices may well drink spirits. There is certainly no reason to assume that they are all teetotallers. Further, the present applicants might reasonably conclude that Alderman McVie's future prospects of election to the society's board of directors would not be enhanced if a justices' meeting, of which he was chairman, refused the society's application for an off-licence. Would any reasonable business man believe that any meeting of which he was chairman could give a completely fair and unbiassed hearing to what was, in effect, an application by the society to extend its business in Barnsley? Moreover, the present applicants know that not one or two of the justices, but six out of seven, were members of the society and may reasonably believe that an esprit de corps exists amongst members of the society, not usually to be found amongst shareholders in the ordinary joint stock company. I find it impossible to hold that there are no real grounds on which ordinary right-thinking persons could reasonably conclude that the justices may well have had a bias in favour of granting the licence. If I pose to myself the exact question propounded by VAUGHAN WILLIAMS, L.J., in *R.* v. *Sunderland JJ.* (1) and approved by LORD ATKINSON in *Frome United Breweries Co.* v. *Bath JJ.* (2):

> "Can it be said here that there was nothing more than a mere possibility or suspicion that these justices would be biassed? We must judge of this matter as a reasonable man would judge of any matter in the conduct of his own business. Can one doubt that a reasonable man as a matter of business would, under the circumstances of this case, infallibly draw the inference that the justices . . . would have a real bias in favour of granting the licence . . .?"

I for my part am wholly unable to give anything but a negative answer to that question. In my view, in the words of LORD SUMNER,

> ". . . there existed in the justices . . . such a likelihood of bias as the parties interested in [opposing the licence] could not justly be called upon to risk."

I agree, for the reasons stated by my Lords, that in the circumstances of this case there is no substance in the argument that the present applicants are now precluded from alleging a likelihood of bias because they did not take the point before the justices.

Taking the view that I do, I doubt whether any question arises under s. 48 of the Licensing Act, 1953. Subsections (1) to (4) of that section impose certain disqualifications. Subsection (5) provides that no act done by any justice

(1) 65 J.P. 598; [1901] 2 K.B. 357.
(2) 90 J.P. 121; [1926] A.C. 586.

disqualified by the section shall be invalid " by reason only " of that statutory disqualification. As pointed out by this court in *R.* v. *Tempest* (1), the proviso to s. 60 of the Licensing Act, 1872, which is reproduced in sub-s. (5), gives no protection in case of bias whether from pecuniary interest or any other cause; it merely avoids the technical disqualifications imposed by the statute; where there is a case of bias it is unnecessary to look at the statute.

There is no doubt that at common law direct pecuniary interest in the subject-matter of a proceeding, however small, operates as an automatic disqualification. This is no mere technicality, but a most salutary rule founded in experience and common sense. As a matter of policy, it is obviously undesirable for any court to embark on the invidious task of deciding exactly how much pecuniary interest raises a presumption of bias on the part of any particular tribunal. Any pecuniary interest, however small, is fatal. In such a case the law assumes bias: *R.* v. *Rand* (2); *R.* v. *Sunderland JJ.* (3). The justices as shareholders had a pecuniary interest, although a very small one, in the subject-matter of the proceedings. It is argued by the present applicants that, on that ground alone and quite apart from the general circumstances with which I have already dealt, the decision should be quashed. On the other hand, the society contend that the combined effect of sub-s. (4) and sub-s. (5) of s. 48 is to oust the common law presumption of bias, at any rate, in all cases where the licensing justices' pecuniary interest in the subject-matter of the proceeding is very small. I must confess that I would be reluctant to read these sub-sections as making any such wide inroad into the common law, unless compelled to do so either by authority or by unambiguous language in the subsections themselves.

In my view, the point is free from direct authority. Neither sub-s. (5), nor any of the former statutory provisions it reproduces, has ever before been invoked in a case where the justices or any of them had a direct pecuniary interest in the subject-matter of their decision. *R.* v. *Tempest* (1), in my judgment, does not touch this point. In that case one justice was technically disqualified under the Act only because he was a shareholder in a brewery company (present sub-s. (2)). That company, however, had no connexion of any kind with the applicants or opponents to the licence. Nor was it suggested that the proposed licensed premises would compete with the company. The justice, accordingly, had no pecuniary interest in the subject-matter of the inquiry and no question touching the common law rule arose. In *R.* v. *Meyer* (4), BLACKBURN, J., points out that the legislature has in many cases removed the disqualification imposed by the common law—see, for example, Justices Jurisdiction Act, 1742, s. 1, Justices of the Peace Act, 1867, s. 2, and the Public Health Act, 1875, s. 258. These and all similar enactments, however, expressly empower the justices to act, for example, in matters relating to rates, notwithstanding the fact that the justices have a pecuniary interest in the matter as ratepayers, or expressly removed the disqualification to which a justice would otherwise be subject, for example, as a member of a town council having, as such, a pecuniary interest in the result of a complaint or information. In cases of this type the justices are in a different position from justices who have a pecuniary interest in any matter as shareholders, and no investigation could ever become necessary into the importance of their pecuniary interest as ratepayers or town councillors. *R.* v. *Handsley* (5). Section 48 of the Licensing Act, 1953, is different from

(1) (1902), 66 J.P. 472.
(2) (1866), 30 J.P. 293; L.R. 1 Q.B. 230.
(3) 65 J.P. 598; [1901] 2 K.B. 357.
(4) (1875), 40 J.P. 645; 1 Q.B.D. 173.
(5) (1881), 46 J.P. 119; 8 Q.B.D. 383.

all the relevant sections in the class of statutes to which I have referred, in that it is not an empowering section and does not purport to remove any disqualification. Indeed, sub-s. (1) to sub-s. (3) impose a number of technical disqualifications going beyond the common law, and sub-s. (4), far from removing the common law disqualification, expressly disqualifies any justice from acting in any matter in which he is financially interested, and thereby adopts the common law rule. What then is the meaning of sub-s. (5): "No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification . . ." ? In my view the words "that disqualification" refer only to the disqualification under the statute. Since s. 48 is not an empowering section or one which removes any disqualification, it leaves the common law disqualification untouched, and this disqualification runs parallel with the statutory disqualification. Accordingly, sub-s. (5), in my judgment, saves any act which would otherwise be invalid by reason only of a disqualification under the section, but it does not save an act done by a justice disqualified at common law. This view seems to me to derive some support also from the judgment of LORD ALVERSTONE, C.J., in *R.* v. *Tempest* (1). It may be asked what purpose could the legislature have had in including sub-s. (4) in s. 48 if it was not intended to absorb the common law disqualification and excuse it under sub-s. (5) ? In my view, sub-s. (4) was included because under sub-s. (6) of s. 48 a fine may be imposed on a justice only if he acts for a purpose for which he is disqualified under the statute. Accordingly, unless sub-s. (4) were included in the section, a justice could be fined for a mere technical disqualification under sub-s. (1) to sub-s. (3), but not for the disqualification of pecuniary interest, which would be absurd.

I have, accordingly, come to the conclusion that the justices' pecuniary interest as shareholders is fatal, and for that reason also this application should succeed. I am fortified in this view by the reflection that if it is correct, the statute will not in any case impose on the courts the task which, according to the policy of the common law, should never be undertaken by a court, namely, the task of deciding exactly how much pecuniary interest raises a presumption of bias on the part of any particular tribunal.

I would only add that I am not unmindful of the practical difficulties stressed by counsel for the society which on the particular facts of this case would be involved in the conclusions I have reached, for all the Barnsley justices (or their near relatives) save one, are members of the society. These difficulties are, however, in my view of little importance in comparison with the principle involved. In any event the difficulties would undoubtedly exist in any summary proceedings other than licensing matters relating to the society. Such proceedings could not be dealt with by the Barnsley bench as at present constituted, for in such a case an irrebuttable presumption of bias would undoubtedly arise. I would allow the application.

Application refused.

Solicitors: *Corbin, Greener & Cook*, for *J. Donald Driver*, Barnsley; *Batchelor, Fry, Coulson & Burder*, for *W. Winter*, Barnsley.

T.R.F.B.

(1) (1902), 66 J.P. 472.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

April 16, 1959

R. *v.* ROSE. *Ex parte* McGIBBON

Husband and Wife—Maintenance—Order made in Jamaica—Rescission—Application in England for summons to rescind—Maintenance Orders (Facilities for Enforcement) Act, 1920 (10 & 11 *Geo.* 5, *c.* 33), *s.* 1 (1), *s.* 4.

On Jan. 23, 1957, a maintenance order was made in Jamaica against the applicant on the ground that he had deserted his wife and wilfully refused to maintain her. The applicant was then in England, his wife being in Jamaica. On Feb. 11, 1958, the applicant's wife came to England at the request of the applicant, who had sent her part of the expenses for the journey. She resumed cohabitation with the applicant in Brixton for about a month. The applicant applied at Lambeth Magistrates' Court, where the order of the Jamaican court had been duly registered, for a summons to rescind the order made in Jamaica. The magistrate held that he was bound by *Pilcher* v. *Pilcher*, (1955), 119 J.P. 458, to hold that no such summons as was sought could be issued under the Maintenance Orders (Facilities for Enforcement) Act, 1920, and refused to issue the order. On application for mandamus directing the magistrates to issue the summons,

HELD: an application to rescind a provisional order made in some part of Her Majesty's Dominions could be made under s. 4 (6) of the Act following the appropriate procedure, but s. 1 (1) contemplated only a summons to enforce an order, and not an application to issue a summons for rescission, and the magistrate was right in holding that he was bound by *Pilcher* v. *Pilcher* to refuse to issue the summons.

APPLICATION for order of mandamus.

On Jan. 23, 1957, a maintenance order was made in Jamaica against the applicant McGibbon on the ground that he had deserted his wife and refused to maintain her. On Feb. 11, 1958, the applicant's wife joined the applicant in England and resumed cohabitation with him for about a month. The order of the Jamaican court was registered at Lambeth Magistrates' Court, and the applicant applied there for a summons to rescind the order. The magistrate refused to issue the summons, holding that he was bound by *Pilcher* v. *Pilcher* (1). The applicant obtained leave for an order of mandamus directing the magistrate to issue the summons.

Gilbert Rountree for the appellant.

The respondent did not appear.

LORD PARKER, C.J.: I will ask SALMON, J., to give the first judgment.

SALMON, J.: On Jan. 23, 1957, a maintenance order was made in Jamaica against the applicant on the ground that he had deserted his wife and wilfully refused to maintain her. The applicant was then in England, his wife in Jamaica. The applicant's wife left Jamaica and came to England on Feb. 11, 1958. She had come at the request of the applicant, and he had sent at any rate part of the expenses for the journey. When she arrived in this country she resumed cohabitation with the applicant at 94, Leander Road, Brixton, for a period of just about a month, and during that time a child was conceived. The applicant applied at Lambeth Magistrates' Court for a summons to rescind the maintenance order that was made in Jamaica, but he was refused a summons by the learned magistrate, who conceived that he was bound by the decision of the Divisional Court of the Probate, Divorce and Admiralty Division in *Pilcher* v. *Pilcher* (1), which case he read as an authority for the

(1) 119 J.P. 458; [1955] 2 All E.R. 644.

proposition that no such summons as was being prayed for by the applicant could be granted. The applicant now applies to this court for mandamus ordering the magistrate to issue such a summons.

The applicant contends that he is entitled to the issue of a summons in this country for rescission of the order made in Jamaica because of the provisions of the Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 1 (1). The first part of that section contains provisions for the registration of maintenance orders in this country; those provisions were in this case duly complied with and the order of the Jamaican court was properly registered at the Lambeth Magistrates' Court. The subsection then continues in these terms:

> "from the date of such registration [the order shall] be of . . . force and effect, and, subject to the provisions of this Act, all proceedings may be taken on such order as if it had been an order originally obtained in the court in which it is registered, and that court shall have power to enforce the order accordingly."

The words on which the applicant particularly relies are:

> "all proceedings may be taken on such order as if it had been an order originally obtained in the court in which it is so registered."

Counsel has made out a powerful argument in support of that proposition. The magistrate, however, as I have already indicated, came to the conclusion that he could not accede to that argument because of the decision in *Pilcher* v. *Pilcher* (1), which in effect decided that that argument was untenable and that the sub-section on which this applicant relies did not give him the right to apply for rescission in this country of the order made in Jamaica.

It is sufficient for me to say that I agree with the decision of the Divisional Court in *Pilcher* v. *Pilcher* (1). It seems clear that s. 1 (1) of the Act of 1920, is, at any rate, ambiguous. The view contrary to the applicant's contention, which was taken by the Divisional Court, was that what that sub-section did was to give a wife power to enforce in this country a maintenance order obtained in Her Majesty's Dominions which had been properly registered in this country in accordance with the provisions of the Act; and the chief basis for coming to that decision was the contradistinction between the language of s. 1 (1) and the language of s. 4, which deals with provisional orders. Section 4 enacts that, if a provisional order is made in any part of Her Majesty's Dominions and is remitted to this country for confirmation, the person against whom the summons was issued can appear in this country and argue that the order ought not to be confirmed. It is further provided by s. 4 (6):

> "Where a provisional order has been confirmed under this section, it may be varied or rescinded in like manner as if it had originally been made by the confirming court, and where on an application for rescission or variation the court is satisfied that it is necessary to remit the case to the court which made the order for the purpose of taking any further evidence, the court may so remit the case and adjourn the proceedings for the purpose."

That section clearly contemplates that a husband may apply to rescind a provisional order made in some part of Her Majesty's Dominions and confirmed in this country, and where it contemplates, as it does, an application to rescind, it sets out the procedure, which is referred to in *Pilcher* v. *Pilcher* (1) as the shuttlecock procedure, whereby there are means provided for the wife to be

(1) 119 J.P. 458; [1955] 2 All E.R. 644.

brought before the court. It seems strange that, if s. 1 contemplated an application for rescission in addition to a summons to enforce, there is no procedure laid down anywhere in the Act whereby the wife, if she was still out of the country, could have her evidence put before the court which was being asked to rescind the order. It is true that in the case before us the wife is in England. One does not know what was contemplated when the Act was passed, but I imagine it must be rare that the wife is in England. The Act seems to contemplate the wife being in her original place of domicil and the husband being in this country. I cannot think that any great hardship need result to the husband in the exceptional case where the wife is in England because, although, in my view, he cannot under s. 1 (1) issue proceedings for rescission, the magistrate is not bound to enforce the original order, and if, when the wife comes before the magistrate asking for the original order to be enforced, the husband can produce evidence that would have entitled him to rescission had he been able to issue a summons for rescission, it is highly unlikely that the magistrate would exercise his discretion in the wife's favour. I should have thought it was certain that in those cases he would, in the exercise of his discretion, refuse to enforce the original order.

For these reasons, in my judgment, the magistrate was right in considering that he was bound by *Pilcher* v. *Pilcher* (1). I would respectfully add that, in my judgment, also the reasons given in *Pilcher* v. *Pilcher* (1) are convincing and that *Pilcher* v. *Pilcher* (1) correctly interprets the true meaning of the Act of 1920. I would refuse this application.

DONOVAN, J.: I agree that this application must be refused. I do so on the ground that the point at issue is covered, as the learned magistrate thought it was, by the decision in *Pilcher* v. *Pilcher* (1). In taking that view I need say no more.

LORD PARKER, C.J.: I agree with the judgment given by SALMON, J.

Appeal dismissed.

Solicitors: *E. A. Mathew, Monty Hellier & Co.*

T.R.F.B.

(1) 119 J.P. 458; [1955] 2 All E.R. 644.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

April 21, 22, 1959

COGLEY *v.* SHERWOOD
CAR HIRE GROUP (SKYPORT), LTD. *v.* SHERWOOD
HOWE *v.* KAVANAUGH
CAR HIRE GROUP (SKYPORT, LTD.) *v.* KAVANAUGH

Road Traffic—Metropolis—Hackney carriage—Plying for hire—Cars of private hire company at airport—Vehicles not exhibited as available for hire —Metropolitan Public Carriage Act, 1869 (32 & 33 *Vict.*, *c.* 115), *s.* 7.

A hackney or stage carriage does not ply for hire within the meaning of the Metropolitan Carriage Act, 1869, unless it is exhibited to the public as being available for hire.

A car hire service had two offices, one in the Central Terminal and one in the North Terminal of London Airport. There were extensive advertisements of the facilities available at desks in both offices and also in other parts of the airport. In order to hire a car a member of the public went to a desk in one of the offices and asked to be driven to a particular destination. He was escorted from the office to one of two standing places and shown into a particular car. At his destination he paid the fare which was based on the distance travelled in accordance with a scale of charges exhibited in both offices. In the Central Terminal the standing place was in a roadway to which the public had no access; in the North Terminal it was in a roadway to which the public had access, but there was nothing which indicated that the cars were for hire and the cars had the appearance of ordinary private cars accompanied by private chauffeurs. The service also had parking places in the airport from which the standings were replenished.

HELD: that the cars were not exhibited as being available for hire, and, therefore, were not plying for hire within the meaning of the Act.

CASE STATED by Middlesex justices.

Four informations were preferred at Uxbridge Magistrates' Court, two by each of the two respondents, who were taxidrivers, charging offences under the Metropolitan Public Carriage Act, 1869, s. 7, in that the appellant company and the appellants were respectively the owners and drivers of two unlicensed hackney carriages which had plied for hire without a licence in the Metropolitan Police District. The informations were heard together at Uxbridge Magistrates' Court, on Jan. 19, 1959, when the following facts were found.

The appellant company's business, which was to let cars on hire, mainly with chauffeurs, to persons requiring immediate transport, was conducted at both the passenger terminals at London Airport. By virtue of a contract between the company and the Minister of Transport and Civil Aviation, at each terminal the company had a desk in the public part and a standing for its cars conveniently placed so as to make the cars readily available to anyone who had hired a car at the desk, and agreed to hire the cars at an agreed scale of charges based on the type of car supplied and the distance travelled. At the Central Terminal the standing was a roadway to which the public did not have access. Both standings were defined by marks on the roadway, but the marks were not easily seen when cars were parked there. The drivers' uniforms were similar to those of private chauffeurs and the cars appeared to be private cars: they did not give the appearance of being available for hire. At both terminals the company also had more remote parking space from which the standings were replenished as and when cars there were hired and driven away. The company's desks were plainly visible to arriving passengers, and notices and advertisements displayed at the desks and elsewhere, in addition to telephone facilities and a

push button bell, provided a clear intimation to members of the public at the airport of the availability to them of the company's services.

On Oct. 28, 1958, the two prosecutors, who were taxi-drivers, each went to different desks and asked to be driven to different destinations. At one desk the clerk wrote on a printed form the name of a driver and the reference number of one of the company's cars; the passenger was escorted to the car, which was at the appropriate standing, and driven to his destination by the appellant Cogley. At the other terminal the desk clerk made entries in a book and the passenger, the other prosecutor, was escorted to another car owned by the company, which was at the appropriate standing, and was driven to his destination by the appellant Howe. Each passenger was asked for and paid to his driver a fare calculated at the agreed scale of charges. The airport was within the Metropolitan Police District and neither car was a licensed hackney carriage. The justices held that the cars were plying for hire, and accordingly convicted the company and each driver of offences against s. 7, but gave them absolute discharges. The company and the drivers appealed.

Neil Lawson, *Q.C.*, and *W. A. Macpherson* for the appellants.

Borders for the respondents.

Cumming-Bruce for the Minister of Transport and Civil Aviation.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the county of Middlesex sitting at Uxbridge, before whom four informations were preferred charging offences against s. 7 of the Metropolitan Public Carriage Act, 1869, in that the appellants were respectively the owners and drivers of two unlicensed hackney carriages, which had unlawfully plied for hire without a licence. The magistrates, after very careful consideration of the authorities, felt constrained to hold that the offences were proved. They convicted the appellants accordingly, but gave them an absolute discharge, ordering in the case of the appellant company that it should pay twelve guineas costs.

The facts giving rise to this matter are shortly as follows: at London Airport there are two sets of buildings for handling passengers, the Central Terminal and the North Terminal. The appellant company, the Car Hire Group (Skyport) Ltd., are, as their name indicates, a car hire concern. They hire out cars which can be driven by customers themselves, but the major part of their business is the hiring out of cars with chauffeurs. They carry on business at London Airport at both terminals under an agreement with the Minister of Transport, who has afforded them standing room for their cars and also facilities in both buildings in the nature of a desk where orders can be taken by people arriving at the airport for transport to their destination in the company's cars. At those desks are extensive advertisements of the facilities available, and those advertisements also appear in other parts of the premises. At each terminal the company is allowed to use a place where its vehicles can stand. In one case, the Central Terminal, the standing is in a roadway to which the public have no access; at the other terminal they stand on a roadway to which the public has access, but there is nothing at the stand which indicates that the vehicles are for hire. They appear to any member of the public to be ordinary private cars accompanied by private chauffeurs.

On Oct. 28, 1958, the two respondents, who are taxi-cab drivers, for the purpose of testing the position, went and hired two cars, one car at the Central Terminal and one at the North Terminal. It is as a result of that that these informations are laid, informations against the driver of the car hired at the Central Terminal and the appellant company, the owners of the car, and two similar informations in regard to the car hired at the North Terminal. It was broadly on those facts

that the magistrates held that both cars were plying for hire within the Metropolitan Public Carriage Act, 1869.

The Act provides, so far as it is relevant to these proceedings, by s. 2:

> "The limits of this Act shall be the Metropolitan Police District, and the City of London and the liberties thereof."

By s. 4, which is the definition section, it is provided:

> "In this Act 'stage carriage' shall mean any carriage for the conveyance of passengers which plies for hire in any public street, road, or place within the limits of this Act, and in which the passengers or any of them are charged to pay separate and distinct or at the rate of separate and distinct fares for their respective places or seats therein.
>
> "'Hackney carriage' shall mean any carriage for the conveyance of passengers which plies for hire within the limits of this Act, and is not a stage carriage."

Finally by s. 7, it is provided:

> "If any unlicensed hackney or stage carriage plies for hire, the owner of such carriage shall be liable to a penalty not exceeding £5 for every day during which such unlicensed carriage plies . . ."

It is quite clear that London Airport is within the limits of the Act, and therefore the only question falling to be determined in these proceedings is whether either or both of the two cars I have mentioned were plying for hire. If they were, then they were clearly unlicensed, and an offence was committed.

The court has been referred to a number of cases from 1869 down to the present day dealing with hackney carriages and stage carriages. Those decisions are not easy to reconcile, and, like the magistrates, with whom I have great sympathy, I have been unable to extract from them a comprehensive and authoritative definition of "plying for hire". One reason, of course, is that these cases all come before the court on Case Stated, and the question whether a particular vehicle is plying for hire, being largely one of degree and therefore of fact, has to be approached by considering whether there was evidence to support the magistrates' finding.

In those circumstances it was unnecessary, and clearly inadvisable, for the court to attempt to lay down an exhaustive definition. Indeed, that was specifically referred to by LORD HEWART, C.J., in *Griffin* v. *Grey Coaches, Ltd.* (1). LORD HEWART, C.J., said:

> "In the course of the argument reference has been made to a considerable number of cases, and attention has been directed to the occasional narrowness of the field of argument and decision in those cases. But it is to be observed that cases on this interesting question of plying for hire usually turn upon the question whether there was or was not evidence in the particular facts of the case justifying the conclusion arrived at by the justices. Nowhere is there any attempt to formulate an exhaustive definition of the meaning of the term 'plying for hire' . . . "

For myself I think that the proper course is to start with the words of the Act and to construe them, before seeing whether there are any decisions binding on us which constrain us to put a different construction on the words. Approaching the matter in this way, the first thing that strikes one is that the Act is dealing with carriages plying for hire, not with persons carrying on the business of letting out carriages. It is the carriage that must ply for hire, and though a human

(1) (1928), 45 T.L.R. 109.

agency must clearly be involved, the Act is directing one's attention to the carriage under consideration and posing the question: is *it* plying for hire? While no doubt in 1869 persons were engaged in letting out carriages on hire, the legislature clearly could not then envisage the considerable business which has grown up of recent years of hiring out cars. Indeed today, as a matter of common sense, I do not think that anyone would say that vehicles belonging to the many car hire concerns are plying for hire in the ordinary sense of the word. It seems to me that the Act is prima facie dealing with a particular carriage whose owner or driver invites the public to be conveyed in it.

The idea is well set out by MONTAGUE SMITH, J., in *Allen* v. *Tunbridge* (1) where the learned judge says:

> " I am of the same opinion upon the authority of [*Clarke* v. *Stanford* (2)]. It appears to have been held there, that, if the proprietor of a carriage sends it to a place for the purpose of picking up passengers, that is a plying for hire within the Act. That is very different from a customer going to a job-master to hire a carriage."

Indeed that passage was approved in *Armstrong* v. *Ogle* (3). In that case LORD HEWART, C.J., said:

> " What is the principle to be applied? It was stated in a single sentence by MONTAGUE SMITH, J., in *Allen* v. *Tunbridge* (1) where he said (referring to [*Clarke* v. *Stanford* (2)]): ' It appears to have been held there, that, if the proprietor of a carriage sends it to a place for the purpose of picking up passengers, that is a plying for hire within the Act. That is very different from a customer going to a job-master to hire a carriage.' The contrast is between a particular and definite private hiring and a public picking up of passengers."

The decision in *Allen* v. *Tunbridge* (1) was a decision of the Court of Common Pleas, but the same idea is, I think, behind the contemporary decisions in the Court of Queen's Bench and the Court of Exchequer. Thus in *Case* v. *Storey* (4), KELLY, C.B., in referring to the words " plying for hire " under a different Act, said:

> " Those words must mean that the carriage is to be at the disposal of any one of the public who may think fit to hire it."

In *Clarke* v. *Stanford* (2), COCKBURN, C.J., said:

> " But where a person has a carriage ready for the conveyance of passengers, in a place frequented by the public, he is plying for hire, although the place is private property."

MELLOR, J., said:

> " But what is the carriage there for? Though the driver makes no sign, he is there to be hired by persons who arrive by train, and there is no restriction as to the persons who, arriving by train, shall hire the carriage; it is therefore plying for hire, within the meaning of the statute."

LUSH, J., said:

> " This carriage was awaiting the arrival of a train, in order to be hired by any person who might come by the train. That is a plying for hire, within the meaning of this statute."

(1) (1871), L.R. 6 C.P. 481; sub nom. *Allen* v. *Trowbridge*, 35 J.P. 695.
(2) (1871), 35 J.P. 662; L.R. 6 Q.B. 357.
(3) 90 J.P. 146; [1926] 2 K.B. 438.
(4) (1869), 33 J.P. 470; L.R. 4 Exch. 319.

In the ordinary way, therefore, I should, apart from authority, have felt that it was of the essence of plying for hire that the vehicle in question should be on view, that the owner or driver should expressly or impliedly invite the public to use it, and that the member of the public should be able to use that vehicle if he wanted to. Looked at in that way, it would matter not that the driver said: before you hire my vehicle, you must take a ticket at the office; aliter, if he said: you cannot have my vehicle, but if you go to the office you will be able to get a vehicle, not necessarily mine.

There are, however, some cases which point to a different conclusion. For my part, however, I find it unnecessary to go into them and for this reason. In all the cases where it has been held that a carriage was plying for hire, it was in fact there and on view. Thus in *Gilbert* v. *McKay* (1), cars were held to be plying for hire even though, as I assume, a member of the public could not choose his vehicle, but, be that as it may, the vehicles were clearly on view; they were standing like taxis might stand on a rank, outside offices bearing the sign " Cars for Hire ". It is true that in that case it was suggested that there might be a plying for hire even if the cars were not on view, and the same appears in *Cavill* v. *Amos* (2), where CHANNELL, J., in giving judgment, said:

> " In ordinary cases, in order that there should be a plying for hire, the carriage itself should be exhibited. He thought, however, that a man might possibly ply for hire with a carriage without exhibiting it, by going about touting for customers."

For myself I think that it is of the essence of plying for hire that the carriage should be exhibited. Here it is clear that the cars in question were not exhibited in this sense of the word. As I have said, the only cars that were on view were at one terminal, and to any ordinary member of the public they did not appear to be for hire; they appeared merely to be ordinary private cars with private chauffeurs.

It is said, however, that the cases concerning stage carriages, and in particular *Griffin* v. *Grey Coaches, Ltd.* (3), to which I have already referred, force one to a different conclusion. Indeed, I think that it was that case that chiefly influenced the magistrates. Thus, in setting out their reasons, they say this:

> " Indeed it is not necessary that at the time the agreement is reached by the hirer and the passenger for the passenger's conveyance that the actual driver or the vehicle to be used is known (*Griffin* v. *Grey Coaches, Ltd.* (3))."

A little later on they say:

> " We considered that the facts in *Griffin* v. *Grey Coaches, Ltd.* (3) and the cases before us had two substantial similarities: in both cases the existence of the service offered to the public was made known by advertisement and the vehicle used was not on view or allocated to the particular journey at the time the agreement for the journey was made."

In *Griffin's* case (1), which, as I have said, concerned a stage carriage, the company, Grey Coaches, Ltd., were owners of motor charabancs, plying at regular hours between London and Brighton. The question was whether the vehicles were plying for hire at Brighton, in respect of which there was no licence. It appears that there were extensive advertisements exhibited at the office in

(1) 110 J.P. 186; [1946] 1 All E.R. 458.
(2) (1900), 64 J.P. 309.
(3) (1928), 45 T.L.R. 109.

Brighton advertising the times of departure of the charabancs, and tickets could be purchased at the office up to ten minutes before the advertised time, but not afterwards. At the time when the tickets were purchased, there was no charabanc in the garage adjoining the office, and it was not until twenty minutes later that the charabanc was driven up by one of the company's servants into the yard to take on the passengers. In the course of his judgment LORD HEWART, C.J., said:

> "What is the real difference, apart from mere accidental difference, between that state of affairs and the state of affairs which exists where the driver of the coach, by gesture or by words, invites the members of the public to board, and to travel upon, a vehicle which they can see? It may be, as has been said, that the particular coach was not then appropriated to the particular journey. It was waiting to be appropriated; it was in a proper and convenient place for that very purpose."

For myself I do not think that this decision in regard to a stage carriage is compelling authority in this case. This court, of course, treats itself as bound by its own decisons. There is, however, at present no appeal, and, that being so, I do not think that the court should treat itself as bound by a previous decision unless there can be said to be no real distinction. It is true that "plying for hire" must have the same meaning whether applied to stage carriages or to hackney carriages. In the former case, however, it may well be far easier to find a plying for hire. Indeed, where a schedule of regular services is advertised and a vehicle or vehicles has been performing those services for some time in full view of the public, there is something to be said for the view that they are exhibited in the sense that I have indicated, even though a particular vehicle is not on view when the ticket is bought. I do not think that *Griffin's* case (1) compels me to come to a conclusion in regard to hackney carriages different from that indicated earlier in this judgment.

In my judgment the magistrates were wrong in treating this case as indistinguishable from *Griffin's* case (1). No conceivable blame attaches to them, and indeed the court is grateful for the clear reasoning set out in the Case on which their decision was based. I would allow this appeal.

DONOVAN, J.: The Lord Chief Justice has already quoted the definition of "hackney carriage" in s. 4 of the Metropolitan Public Carriage Act, 1869, and I need not repeat it. Section 6 gives the Secretary of State power to license to ply for hire both stage carriages and hackney carriages within the territorial limits of the Act, namely, the Metropolitan Police District and the City of London. Section 9 gives him power to make regulations, inter alia, for fixing the stands of hackney carriages; s. 7 provides, as has already been stated, that if any unlicensed hackney carriage plies for hire or uses one of the fixed stands the owner is liable to a continuing penalty. The motor cars concerned in the present case are hackney carriages within the definition in s. 4, and London Airport is within the territorial limits of the Act. The sole issue is whether these cars, in the circumstances detailed in the case, and which the Lord Chief Justice has already narrated, "ply for hire" within the meaning of s. 7.

When that section was enacted hackney carriages were, I suppose, solely horse-drawn, and indeed one meaning of the word "hackney" is "an ambling horse". The purpose of the Act was clearly to exercise control over these vehicles so as to ensure a proper standard of safety and cleanliness, and of competency in their drivers, for the driver has to be licensed, too, under s. 8.

(1) (1928), 45 T.L.R. 109.

The motor car has now displaced the horse carriage and in addition a very large business has grown up of private hire of motor cars. These new conditions do not mean that plain words in the statute are now to be given something other than a plain meaning. They do, however, in my view, involve that when the court is asked to apply the language of 1869 to the vastly different circumstances of 1959, then a very close scrutiny of the words is demanded.

The expression "plying for hire" is not defined in the statute, and I would respectfully concur in the justices' finding that no comprehensive definition is to be found in the decided cases; but the term does connote, in my view, some exhibition of the vehicle to potential hirers as a vehicle which may be hired. One can perhaps best explain the reason by taking an example. It is a fairly common sight today to see in smaller towns and villages a notice in the window of a private house "Car for Hire". If the car in question is locked up in the owner's garage adjacent to the house, it could not in my view reasonably be said that at that moment the car was "plying for hire". If a customer wishes to hire it, he comes and makes his terms with the owner. On the return journey the owner might exhibit a sign on its windscreen, as some of them do, "Taxi" and then clearly he would be plying for hire. Similarly, if he left the car outside his house, the same notice on the car would involve, I think, that the car was then plying for hire, and the notice in the window might also then have the same effect. The essential difference in the circumstances that I have compared is that in the one the car is not exhibited at all, whereas in the other it is, coupled with the notification that it may be hired. I am fortified in suggesting a test of exhibition by several considerations. The first is that there is no decided case where a hackney carriage was held to be plying for hire where it was not exhibited so as to be visible to would-be customers. In *Gilbert* v. *McKay* (1) the cars were just outside the premises of the car hire firm which bore advertisements that cars were for hire.

Secondly, in s. 7, the words are: "If any unlicensed carriage plies for hire" thus indicating that one is to look and see what the vehicle itself is doing, albeit under human agency. I find it very difficult to say that a vehicle which is not exhibited in some way is a vehicle plying for hire. Like my Lord, I do not regard the decision in *Griffin* v. *Grey Coaches, Ltd.* (2) as antagonistic to this view. There it is true that the charabanc was not on view at the time that the passenger booked his seat. But the court was there dealing with a regular service at regular times along a regular route. One can, I think, exhibit a vehicle such as an omnibus or a charabanc just as effectively for the purpose of hire in this way as by any other. By these means it will come to the notice of prospective customers, which after all is the object of exhibition.

The court is dealing in this case with two particular vehicles, one engaged from the Central Terminal and one from the North Terminal. The case finds that at the Central Terminal the cars stood while waiting to be hired on a roadway to which the public had no access. There is no such precise finding as to the situation of the standing at the North Terminal, but there is certainly no evidence that at either standing there was any notice that the cars, or any of them, were for hire. This no doubt explains the contention put in the forefront of the appellants' case, namely, that the two cars were not exhibited to intended passengers, or at all. This is not met by any opposing contention on the part of the respondents. The justices appear to deal with the case on the footing

(1) 110 J.P. 186; [1946] 1 All E.R. 458.
(2) (1928), 45 T.L.R. 109.

that the cars were not on view, for they say in effect that, despite this, the decision in *Griffin* v. *Grey Coaches, Ltd.* (1) compelled them to the conclusion that this circumstance was inconclusive. I have already stated why, in my view, the charabancs concerned in that case were in fact on view. If, then, the two cars with which this case is concerned were not exhibited to the public as being available for hire, I think that it is wrong to say of these vehicles that they were then hackney carriages " plying for hire ".

The respondents' main contention begins in this way: plying for hire really means carrying out the business of carrying passengers for hire or reward. With respect I think that this suggested definition is misleading. The business is carried on by the owners of the cars and s. 7 is not designed to regulate that business as such. It deals with the vehicle itself, and enacts that the vehicle shall not, if unlicensed, ply for hire. Of course, the vehicle can do nothing except under human control, but the section is contemplating the function which the vehicle itself is fulfilling, albeit under human control, at a particular time.

I do not find it possible to say that a hackney carriage not on view to the public is, when not so on view, plying for hire, particularly when at the same time there is no indication in or around it that it ever does such work. I agree also with the judgment of the Lord Chief Justice, and accordingly I also would allow this appeal.

SALMON, J.: I also agree, for the reasons stated by my Lord, although not without some doubt, that this appeal should be allowed. Such doubt as I feel springs not from the words of the statute, which appear to me to be reasonably plain, but from the multifarious decisions on it. If the matter were res integra, I should have thought that it was obvious that the words " plying for hire " have a meaning different from and narrower than " letting for hire " or " carrying on a private hire business ". But for authority, I should have thought that a vehicle plies for hire if the person in control of the vehicle exhibits the vehicle and makes a present open offer to the public, an offer which is accepted by the member of the public stepping into the vehicle.

In the case of a bus or charabanc it would matter not that he buys the ticket before he goes into the bus or after he enters the bus. In cases such as those, the member of the public knows nothing about and has no time for making any inquiry about the vehicle or the standing or indeed the identity of the owner, and it is not surprising that in cases such as those Parliament should make arrangements so that the vehicles which so ply for hire shall be of a certain standard of safety and comfort on which the member of the public can rely.

From time to time in the past people owning vehicles which were plying for hire have exercised their ingenuity for circumventing the provisions of the Metropolitan Public Carriage Act, 1869, and on a large number of occasions this court has had to consider those attempts. During the course of the case, observations have been made which deal with the particular circumstances of the case, but which have been followed and expanded in other cases, and so we have come to a position where, on the authorities, it is possible, as has been pointed out by counsel for the Minister of Transport and Civil Aviation, to make a powerful argument, as counsel for the respondents had done, for holding that this Act means something quite different from what any ordinary man would think that it meant on reading it. Indeed this court, to my mind, is driven to the very brink of saying that whenever a private hire firm has a fleet of motor cars in its garage and advertises for customers, those motor cars are plying for

(1) (1928), 45 L.T.R. 109.

hire. That seems to me to be quite wrong, and it was never within the contemplation of the Act that the job-master, who was the counterpart in 1869 of the car hire service of 1959, should be within the Act, as was pointed out by MONTAGUE SMITH, J., in *Allen* v. *Tunbridge* (1), as long ago as 1871. I do not feel that we are constrained by authority to cross the brink, although authority I think prevents us finding that the making of a present open offer is a necessary part of plying for hire. I do not feel compelled by any authority to find that a vehicle plies for hire unless it is exhibited. In this case the vehicles were not, as my Lords have pointed out, exhibited, and for that reason I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Coward, Chance & Co.*; *Alexander Charles*, Leytonstone; *Treasury Solicitor.*

T.R.F.B.

(1) (1871), L.R. 6 C.P. 481; sub nom. *Allen* v. *Trowbridge*, 35 J.P. 695.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

April 22, 23, 1959

R. & T. GLYNN EVANS AND OTHERS *v.* LIVERPOOL CORPORATION

Street—Private street works—Objections to proposal by frontagers—No application to court to determine objection—Proposal abandoned—Power of local authority to pass new resolution and amend estimate—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *s.* 6, *s.* 7, *s.* 8, *s.* 11.

In September, 1931, a local authority resolved, pursuant to s. 6 of the Private Street Works Act, 1892, to make up a road. Objections on behalf of the majority of the frontagers were lodged, but no application was made to have these determined by a court of summary jurisdiction. In April, 1948, the local authority resolved pursuant to the aforementioned provisions to make up the road and the resolution bore no reference to the previous resolution. Again objections were lodged, but no application was made for their determination. In January, 1952, the local authority resolved, pursuant to s. 11 of the Act, to amend the 1948 estimate of the probable expenses and the provisional apportionment. Objections to this resolution were lodged, and, on application by the local authority, disallowed by the court.

HELD: that, on the facts, the original resolution of September, 1931, must be regarded as having been abandoned; the abandonment did not prevent the local authority from passing validly a new resolution under s. 6; and, therefore, the resolutions of 1948 and 1952 were valid.

CASE STATED by the stipendiary magistrate of the City of Liverpool.

Objections lodged by the appellants, the frontagers, to proposals made by the respondents, the Liverpool Corporation, under the Private Street Works Act, 1892, were heard by the magistrate, who found the following facts. In September, 1931, the respondents resolved pursuant to s. 6 of the Private Street Works Act, 1892, to make up Leinster Road, Liverpool. The formalities in connexion with the publication of the resolution were duly complied with and within the prescribed statutory period objections were lodged on behalf of the majority of the frontagers. The respondents took no steps to have the objections determined by a court of summary jurisdiction and they did not proceed with their

proposal to make up the road. On Apr. 7, 1948, the respondents resolved pursuant to the provisions of the Act to make up the road and the resolution bore no reference to the previous resolution of September, 1931. The formalities required were duly complied with and within the prescribed statutory period an objection was lodged by the appellants on behalf of some of the frontagers. No steps were taken by the respondents to have the 1948 objections determined by a court of summary jurisdiction. On Jan. 2, 1952, the respondents resolved pursuant to s. 11 of the Act to amend the estimate of the probable expenses of the work of making up the road and the provisional apportionment of such expenses among the premises to be charged therewith. The formalities required in connexion with the publication of this amending resolution were duly complied with and within the prescribed period the objections which were the subject-matter of the application were lodged by the appellants, and came before the magistrate in May, 1958.

It was contended for the appellants: that, as the respondents had taken no steps to have the 1931 objections determined by a court of summary jurisdiction, the respondents must be deemed to have abandoned their proposal, so that they could no longer seek to apportion the expense of making up the road among the frontagers and that the court thereby had no jurisdiction to determine the proposal. Alternatively, if it were found that the respondents had not abandoned their 1931 proposal but had indefinitely deferred it, the respondents were under a duty to give public notice of such deferment and that their failure to do so deprived them of the right to use the provisions of the Act in 1948 and/or deprived the court of jurisdiction to determine the proposal. Moreover, that the respondents were under a duty on objections being properly lodged pursuant to the provisions of the Act to apply to a court of summary jurisdiction to appoint a time for the determination of those objections. Alternatively, that if the magistrate decided against these contentions the proceedings in respect of the 1948 proposals were null and void and of no legal effect in that the 1931 proposals being still in existence at the date of the 1948 proposals, the proceedings by the respondents in 1948 should have been by way of an amending resolution and an amended estimate, in accordance with s. 11 of the Act, and further that by reason thereof the steps taken by the respondents in 1952 were also null and void and of no legal effect. Further, that in any event it was unjust, unreasonable and inequitable that the frontagers should be called on to pay any sum greater than the estimated amounts to be paid by them in 1948, for such increase in the costs as had taken place since then had only arisen by reason of the delay on the part of the respondents to have the objections lodged in that year determined.

For the respondents it was contended (a) that the respondents were in the case of each resolution entitled to apply to the court of summary jurisdiction at any time after the expiration of one month from the date of first publication of such resolutions and were under no duty to make any such application until there was reasonable anticipation of practical commencement of the work in the near future. (b) That they were entitled to abandon proposals made under the Act having regard, among other factors, to objections which had been lodged, and in particular were entitled to, and did, abandon their 1931 proposals. (c) That by such abandonment the respondents did not bar themselves thereafter from time to time when the conditions of s. 6 of the Act were satisfied from making resolutions in pursuance of the Act. (d) That they were under no duty to give notice of the abandonment or indefinite deferment of their 1931 proposal. (e) That on Apr. 7, 1948, the conditions set out in s. 6 of the Act were satisfied

and the respondents' resolution of that date was valid. (f) That the appellants were less likely to be prejudiced by the respondents' resolution of Apr. 7, 1948, than by an amendment of the 1931 proposal, in view of the lapse of time, the probability of changes of ownership and the possibility of objecting on all the grounds set out in s. 7 of the Act and not merely on those set out in s. 11. (g) That the 1948 and 1952 proposals being valid by reason of the foregoing contentions and the provisions of the Act, the frontagers were bound in law to pay the cost of making up the road.

The magistrate found that the respondents' resolution dated Apr. 7, 1948, was valid and that their resolution of Jan. 2, 1952, amending the estimate and provisional apportionment referred to in their resolution of Apr. 7, 1948, was also valid, and the appellants' objections accordingly failed. The appellants appealed to the Divisional Court. The question stated for the opinion of the High Court was whether on the foregoing facts the magistrate came to a correct decision in law.

Andrew Rankin for the appellants.
D. B. McNeill for the respondents.

SALMON, J.: In this case the respondents, who are the Lord Mayor, Aldermen and Citizens of the City of Liverpool, passed a resolution on Sept. 17, 1931, pursuant to the provisions of s. 6 of the Private Street Works Act, 1892, to make up a certain roadway known as Leinster Road in the City of Liverpool. Section 6 (1) reads as follows:

> "Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works) . . . and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street."

Subsection (2) provides that the surveyor shall prepare, as respects each street or part of a street, a specification of the private street works, an estimate of the probable expenses, and a provisional apportionment of the estimated expenses among the premises liable to be charged. Then sub-s. (2) further provides that

> ". . . such specification, plans, sections, estimate, and provisional apportionment . . . shall be submitted to the urban authority, who may by resolution approve the same respectively with or without modification or addition as they think fit."

Subsection (3) of s. 6 provides:

> "The resolution approving the specifications, plans, and sections (if any), estimates, and provisional apportionments, shall be published in the manner prescribed in Part 2 of the Schedule to this Act, and copies thereof shall be served on the owners of the premises shown as liable to be charged in the provisional apportionment within seven days after the date of the first publication."

The formalities of those provisions were duly complied with and an objection was made on behalf of certain of the frontagers concerned. Section 7, which deals with objections, reads as follows:

> "During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses

of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds . . ."

Then s. 7 sets out six grounds, which I need not read, on which the objection may be founded.

The objections lodged to the 1931 proposal were that the works were unreasonable and the estimated expenses excessive. The respondents, however, took no steps to have these objections determined and nothing further occurred until Apr. 7, 1948, when the respondents passed a fresh resolution to make up Leinster Road. This resolution was silent as to the 1931 resolution. The formalities required by the Act were complied with and objections were duly lodged on behalf of the owners of the premises adjoining Leinster Road. No action was taken by the respondents to have the 1948 objections determined under s. 8 of the Act. Section 8 (1), which deals with the manner in which the objections are to be heard and determined, provides as follows:

"The urban authority at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors; and at the time and place so appointed any such court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be, and with the same powers and subject to the same provisions with respect to stating a case, as if the urban authority were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The court may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority. The court may also, if it thinks fit, adjourn the hearing and direct any further notices to be given."

The next thing that occurred was that on Jan. 2, 1952, the respondents resolved, pursuant to s. 11 of the Act, to amend the estimate of the probable expenses of making up the road and the provisional apportionment of these expenses amongst the owners of the premises adjoining the road. Section 11 deals with amendments and reads as follows:

"The urban authority may from time to time amend the specifications, plans, and sections (if any), estimates, and provisional apportionments for any private street works, but if the total amount of the estimate in respect of any street or part of a street is increased, such estimate and the provisional apportionment shall be published in the manner prescribed in Part 2 of the Schedule to this Act, and shall be open to inspection at the urban authority offices at all reasonable times, and copies thereof shall be served on the owners of the premises affected thereby; and objections may be made to the increase and apportionment, and if made shall be dealt with and determined in like manner as objections to the original estimate and apportionment."

It is to be observed that under s. 7 the objections to the original resolution may be made on one of six grounds; under s. 11 the objections to the amendments can be made only on one of two grounds. The formalities required in connexion with the publication of the amending resolution were complied with, and objections were duly lodged on behalf of most of the house owners concerned. The

respondents waited until 1957 or 1958 and they then applied for the determination of those objections to the stipendiary magistrate of the City of Liverpool who ruled that the objections failed, and it is from that ruling that the appellants now appeal by way of Case Stated.

On their behalf the first point that is taken is that the respondents must be deemed to have abandoned the resolution of 1931 and that abandonment precludes them from passing any further resolution to make up the road; the abandonment takes away their rights under the Act of 1892, and it means that if they are to make up the road in future, they will have to pay for it. It is a startling proposition that if a local authority abandons a resolution for making up a road under the Private Street Works Act, 1892, it for ever loses its power in the future to pass a resolution under the Act for the purpose of making up the road. The argument seems to lead to very strange and, indeed, ridiculous results and is contrary to the plain words of the section. It is to be observed that s. 6 of the Act is an empowering section and by its express words it gives a power which the urban authority may exercise from time to time, and, indeed, the Act clearly by its language contemplates that whenever the urban authority considers that public convenience or safety demands that the road shall be made up, it shall exercise its powers. Suppose, for example, that in the year 1893 the local authority had a scheme for making up the road which on objection was abandoned, and suppose that in 1959 public convenience and safety required that the local authority should exercise its right under s. 6 in respect of the road and the local authority duly passed a resolution under s. 6, then any person to be charged with the expense of making up the road under the Act could, if counsel for the appellants is right, defeat the resolution by showing that in 1893 there had been the proposal to make up this road and that the proposal had been abandoned. I cannot believe that such a strange result is right. I should not give effect to that argument unless I was compelled to do so by plain authority. There is no such authority, and, accordingly, in my view the argument fails.

The next point taken by counsel for the appellants is this. He says that as there was no abandonment of the 1931 resolution, the 1931 resolution is alive. Therefore, the respondents were wrong in passing the resolution which they purported to pass in 1948; they should then not have started de novo, as the resolution of 1931 was in being. All that they could do was to go by way of amendment under s. 11 of the Act, and, therefore, the resolution they did pass is void and of no effect. This argument turns on whether there was an abandonment or not. I do not pause to consider what the effect might be if there were no abandonment, since I take the view that there clearly was an abandonment and the question of what might happen if there was not one is not material. The argument proceeds on this basis. First of all, as I understand it, counsel for the appellants says that the resolution cannot be abandoned once it has been made and objection has been taken to it, because s. 8 of the Act is mandatory and imposes an obligation to have the objection determined by a court of summary jurisdiction. That argument involves a misconception, and I do not consider that it is in any way supported by *Faulkner* v. *Hythe Corpn.* (1) on which the appellants relied. In my judgment, all that the Act lays down and all that that case states is that if the expense of making up the road is to be recovered from the frontagers, then before it can be recovered, if they have objected, those objections must be heard and determined by a court of summary jurisdiction. Moreover, the case to which I have just referred is also an authority for the proposition that it is not permissible for the local authority

(1) 91 J.P. 22; [1927] 1 K.B. 532.

to proceed with the works before the objections have been heard; in order to recover the local authority have got to show that the works were not proceeded with until the objection had been heard and determined.

Then it is said that a letter was written in August, 1957, to the representative of one of the objectors in which the town clerk stated as follows:

> "Notices under the above Act were served upon the frontagers first in 1931. A majority of owners then objected to the proposal and the city council decided accordingly to defer indefinitely the proposal to carry out the work."

It is said that there is a letter from the town clerk stating that the proposal was deferred indefinitely and that letter is quite inimical to the argument, so it is said, that the proposal was abandoned. I do not agree with that contention. I do not think that there is anything which prevents the council from abandoning a scheme set out in a resolution, say, in the year 1910 and then twenty or thirty years later making a fresh scheme by a new resolution. The scheme of 1910 is abandoned, but the proposal that the road may be made up when necessary is not abandoned; that is indefinitely deferred. Indeed, the Act seems to me, by stating in s. 6 that the urban authority may from time to time pass a resolution, to make it impossible for the local authority to resolve that they shall never pass any resolution in respect of making up the road. Similarly, I do not think on the words of the Act that it is possible to regard anything done by the local authority as putting it out of their power ever in the future to exercise the powers expressly conferred on it by the Act. On the facts of this case it is impossible to come to any view other than that the resolution of 1931 was abandoned. Nothing happened for seventeen years and then in 1948 a fresh resolution was passed adopting a fresh scheme.

Counsel for the appellants seeks to derive some support from *Southampton Corpn.* v. *Lord* (1). He relies chiefly on an obiter dicta of MATHEW, L.J., when that case reached the Court of Appeal. That case deserves to be examined in order to appreciate what MATHEW, L.J., meant by the words on which the appellants rely. It appears that on Apr. 14, 1897, a resolution was passed by the Southampton Corporation that a certain street should be sewered, levelled, paved, metalled, flagged, channelled and made good and properly lighted, and formalities were duly complied with by the preparation of the necessary specification, plans, sections, estimate and provisional apportionment. Then by resolution of July 28, 1897, those documents were duly approved without modification or addition. In October the frontagers concerned delivered what was called a memorial of objections. It was an informal document which, amongst other things, set out the reasons why they desired that the proposals of the council should not be carried into effect. As a result of that memorial the council met again in October, 1897, and introduced a new scheme and that scheme provided that the same road should have the work done to it which had been envisaged by the first scheme a few months earlier but only for about half its distance and that for the rest of its length the work should be confined to lighting the road. That new resolution was finally approved by the council and all the various specifications, plans, sections and apportionment in connexion with it. The resolution of the council of Dec. 22, 1897, was duly published and no memorial or objection of any kind was made to the second scheme. The work was carried out and the corporation sought in the action to recover the appropriate expenses from the defendant, who was one of the frontagers. The point taken on behalf of the frontager, the defendant in the action, was that

(1) (1903), 67 J.P. 189.

there had been no abandonment of the first scheme in October, which was finally approved in July, 1897, that the memorial which had been delivered on behalf of the frontagers was an objection under s. 7 of the Act, and that since that objection had not been adjudicated on by a court of summary jurisdiction, the plaintiffs, the Southampton Corporation, could not recover from the defendant. The point taken on behalf of the corporation was that the first scheme confirmed in July had been abandoned, that no objection had been taken to the second scheme approved in December of the same year and that, therefore, the corporation could recover in the action. Alternatively, the corporation took the point that if the first scheme had not been abandoned and if the defendant was right in suggesting, as he did, that the second scheme of December must merely be regarded as an amendment of the first scheme, then the memorial was not an objection under s. 7 and there was in any event, whichever scheme was looked at as the effective scheme, a scheme to which objection had not been taken, and, therefore, the corporation were entitled to succeed.

WRIGHT, J., tried the case at first instance and he held that the scheme, which was finally confirmed in July, 1897, had been abandoned. It seems that he held that it had been abandoned on this ground; that when the second scheme was confirmed in December and had been duly advertised and notices had been served on the parties concerned, it was quite plain that the old scheme was not going forward, that the corporation had abandoned the old scheme and were putting forward a new one in its place. The case which this court is considering is, of course, a much stronger case, because this is not a case where only a few months have elapsed; this is a case where seventeen years have elapsed between the two resolutions. It seems obvious that no one in 1948, except by the exercise of a good deal of ingenuity, could have been under any misapprehension whether the 1931 resolution had been abandoned. WRIGHT, J., who was a great authority on this branch of the law, came to the conclusion that the first scheme had been abandoned, and it seems from that to follow that he was of the opinion that there was power to abandon it in the way in which the corporation abandoned it in that case. He also held that in any event the memorial did not constitute an objection under s. 7, and on that ground also, abandonment or no abandonment, the defence failed.

When the case went to the Court of Appeal VAUGHAN WILLIAMS, L.J., and STIRLING, L.J., expressed no opinion on the abandonment point because they were firmly of the view that in any event the memorial did not constitute an objection under the Act. MATHEW, L.J., who also came to the conclusion that the memorial did not constitute an objection under s. 7 of the Act, said:

> "With reference to the other point, I desire to guard myself against being supposed to yield to the argument that the local authority cannot withdraw a scheme of this sort—that it cannot by public notice served upon everyone intimate that the proceedings have been abandoned. I see no reason at present for holding that such a course cannot be maintained, but it may be a matter which may have to be discussed hereafter, and discussed at length."

That is the passage on which counsel for the appellants relied. It has been discussed in this court, and it has been suggested that MATHEW, L.J., was saying that a scheme, if it could be abandoned at all, could only be abandoned by express notice. I do not read that passage as meaning anything of the sort. I consider that all MATHEW, L.J., was saying was that he was far from deciding that a scheme could not be abandoned and then he gave an example of how it could be abandoned, and one of the obvious ways in which it could be abandoned, of course, was by direct notice. It is also interesting to observe that having said

that, and apparently having expressly reserved the point, he says, at the very end of his judgment:

> "I agree that the appeal must be dismissed, and I agree throughout with the judgment of my brother WRIGHT."

Whether he meant the whole of the judgment, as he seems to say, I do not know; this is not a very extensive report, perhaps, of what MATHEW, L.J., said. The proper way of looking at it is that the point was left open in the Court of Appeal and that WRIGHT, J.'s decision is quite inimical to the contention now being put forward on behalf of the present appellants. For my part I agree with WRIGHT, J.

The final point is that considerable hardship has been put on these frontagers. The respondents have waited and waited during a period in which costs were steadily mounting and now the work is to be done in 1959 when it will cost the frontagers very much more than it would have cost them in 1931 or even in 1948 or 1952. It may very well be that that is the case, but I hardly think it lies in the mouth of these appellants to make that complaint. The respondents wished to do the work in 1931 and but for the objections of the appellants they would presumably have done it. They wanted to do the work again in 1948 and again the appellants objected. Then there was an amendment of the scheme in 1952 and there was a further objection by the appellants. The points they take are purely technical points, because it was conceded when this matter was before the magistrate that it was necessary and desirable that this road should be made up on the facts as they existed.

The two points of law taken are in my view without any real foundation, and I would dismiss the appeal.

DONOVAN, J.: I agree. I would only add this in deference to the argument of counsel for the appellants. On the facts it is indisputable that the 1931 scheme, by which I mean the proposal to make up the road according to a certain specification at a specified cost, was abandoned as a scheme. Counsel for the appellants says that it follows that no new scheme can ever be proposed by the local authority except one which will be executed at their own cost. I have tried to understand why that consequence should follow as a matter of law, but I have failed. It seems to conflict with the plain terms of s. 6 of the Private Street Works Act, 1892, which empowers the local authority from time to time to resolve to do these works and to serve the specification on the frontagers with a view to recovering the cost from them.

I also think that the magistrate came to a correct conclusion in this case.

LORD PARKER, C.J.: I agree.

Appeal dismissed.

Solicitors: *Purchase, Clark & Treadwell*, for *Rollo & Mills-Roberts*, Liverpool; *Cree, Godfrey & Wood*, for *Town Clerk*, Liverpool.

T.R.F.B.

QUEEN'S BENCH DIVISION

(SALMON, J.)

March 19, May 4, 1959

ATTORNEY-GENERAL (on the relation of MANCHESTER CORPORATION) *v.* HARRIS AND OTHERS

Injunction—Contravention of statute—Relator action for injunction after repeated contraventions—Scope of court's discretion in relator action for an injunction —Need to show injury to public.

In all relator actions, notwithstanding that the Attorney-General has exercised his discretion in bringing the action and that the defendant has contravened the provisions of a statute, it is the duty of the court to inquire whether the acts done by the defendant in truth injure the public; if it is established that the public has in fact suffered no injury, the court may in the exercise of its discretion refuse to grant an injunction restraining the defendant's acts, though it is only in the most exceptional circumstances that any statutory provision can be contravened without public injury.

For some years, on almost every Sunday in the year, the defendants had sold flowers from two stalls which were placed close to railings dividing a footpath from the adjoining cemetery and near to the pedestrian entrance to the cemetery. The footpath was between fifteen and sixteen feet wide, and the flower stalls projected about three feet six inches from the railings on to the path. Except on Mothering Sunday, few pedestrians used the footpath. In offering flowers for sale in this manner, the defendants did not incommode anyone using the footpath, and such obstruction as they caused was so slight as not to amount to a nuisance. However, prosecutions were instituted against the defendants for two offences under the Manchester Police Regulation Act, 1844, s. 102. The defendants clearly committed these offences every time that they offered flowers for sale outside the cemetery in the above manner and they were duly convicted and fined on many occasions, although the offences were trifling, and did not cause the slightest injury to the public. Notwithstanding the convictions and fines, the defendants continued to operate the flower stalls. The Attorney-General, suing on the relation of the local authority, now brought this action for an injunction restraining the defendants from contravening the Act of 1844. There were no other means available to prevent the defendants' continuing their contraventions of the Act of 1844.

HELD: (i) in determining whether to grant an injunction the court must exercise its discretion independently of the Attorney-General's decision to institute proceedings for that relief; (ii) in the special circumstances of the case the defendants' acts had not caused injury to the public, although they contravened a statute, and the injunction would be refused.

ACTION by the Attorney-General, suing on the relation of the corporation of the city of Manchester, claiming against each of the defendants, Robert Harris, his wife Audrey Harris, and Jack Ferst, an injunction perpetually restraining them from placing or using any stall or other article on any footway in the city of Manchester and from exposing for sale on or near any such footway flowers or other articles so as to obstruct or incommode the passage of the footway contrary to the Manchester Police Regulation Act, 1844, s. 102.

The action was tried at Manchester Assizes and the following facts were found by SALMON, J. On the outskirts of the City of Manchester, at West Didsbury, there is the Manchester Southern Cemetery. The cemetery is bounded on one side by Princess Road and on another side by Barlow Moor Road; in Barlow Moor Road there are several florists' shops. The footway of Princess Road, which is contiguous with the cemetery, is between fifteen and sixteen feet wide and is divided from the cemetery by iron railings. Close to the railings there is a line of trees about fifty feet apart. Since 1955, on almost every Sunday, the defendants sold flowers from stalls which were placed close to the railings between two trees to the left of the pedestrian entry to the cemetery. The defendants

Robert Harris and Audrey Harris operated from one stall which was about seven feet long and which projected about three feet six inches from the railings, while the defendant Ferst operated from an adjacent stall of similar dimensions. Except on Mothering Sunday there were never more than a few pedestrians using this wide footway. On rare occasions, the defendants may have placed their stalls on that part of the footway which was adjacent to the lay-by. In offering flowers for sale in the above manner, the defendants (who were respectable citizens) were not causing the slightest nuisance or inconvenience to the public using the footway in Princess Road; they were carrying on a business which was of advantage to the public as well as to themselves. Moreover, it seemed to be clear that, but for pressure brought to bear on Manchester Corporation by the owners of some of the flower shops in Barlow Moor Road, no prosecution would have been instituted against the defendants because, after the defendants had been selling flowers for many months and their activities had been observed and reported on by the police and the city surveyor and engineer, the unanimous conclusion was reached by the police, the highways committee and the town clerk, that no action could justifiably be taken against them (a decision with which HIS LORDSHIP was not disposed to differ). However, as appeared from the agreed correspondence, the owners of the flower shops had enlisted the support of two councillors who had put it to the town clerk that the defendants' flower stalls amounted to unfair competition. As a result, in February, 1956, the first of a large number of prosecutions was instituted against the defendants for offences under the Manchester Police Regulation Act, 1844, s. 102, the relevant part of which provides:

> "... every person shall be liable to a penalty of not more than forty shillings who in any street shall commit any of the following offences ... every person who shall ... place or use any ... stall ... on any footway ... Every person who ... by hawking or exposing for sale any ... article on or near any footway or by any other means shall obstruct or incommode the free passage of any such footway."

Notwithstanding the numerous prosecutions and the convictions and fines imposed on them, the defendants continued to operate their flower stalls in breach of s. 102 of the Act of 1844.

Fenton Atkinson, Q.C., and *J. M. Lever* for the Attorney-General.
Rose Heilbron, Q.C., and *I. R. Taylor* for the defendants.

Cur. adv. vult.

May 4. **SALMON, J.**, having stated the facts and referred to the relevant provisions of the Manchester Police Regulation Act, 1844, s. 102, read the following judgment: There can be no doubt but that the defendants committed offences under the Manchester Police Regulation Act, 1844, every time they offered flowers for sale outside the cemetery in the way described. The defendants did place a stall against the railings which projected a little on to this very wide footway, and accordingly this stall technically obstructed that part of the footway on which it rested although it did not in the slightest incommode anyone using the footway. I find that the obstruction was so slight and inappreciable that it certainly did not amount to nuisance. Accordingly, if any proceedings had been brought against these defendants based on nuisance, such proceedings would have been doomed to failure: see *A.-G.* v. *Wilcox* (1) and *R.* v. *Bartholomew* (2).

(1) [1938] 3 All E.R. 367; [1938] Ch. 934.
(2) 72 J.P. 79; [1908] 1 K.B. 554.

The defendants, however, have been prosecuted under the Act of 1844 on a very large number of occasions. Although the offences were trifling and caused not the slightest injury to the public, since they had been committed the magistrate had no course open to him other than to convict; as a rule he marked his view of the triviality of the matter by the smallness of the fines imposed even after many convictions. The last twenty-two fines for obstruction recorded against the defendant Robert Harris are for 2s. 6d. each. In spite of the convictions and fines over a number of years, the defendants continued and continue to ply their trade outside the cemetery, and thereby to commit the technical offences to which I have referred. These are the circumstances in which the town clerk was authorised to apply to the Attorney-General that all necessary steps should be taken to obtain an injunction against the defendants. This action was then instituted.

It is conceded that the granting of an injunction is discretionary. Counsel on behalf of the plaintiff, however, argues that since the Attorney-General has in the exercise of his discretion come to the conclusion that an injunction should be granted, and accordingly brought this action, the court must exercise its discretion by granting an injunction. I reject this argument. In support of this argument counsel relied chiefly on *London County Council* v. *A.-G.* (1). In that case the EARL OF HALSBURY, L.C., observed:

> "It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into court some trifling matter. But if he did, it would not go to his jurisdiction, it would go, I think, to the conduct of his office, and it might be made perhaps in Parliament the subject of adverse comment; but what right has a court of law to intervene? If there is excess claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the courts to determine whether he ought to initiate litigation in that respect or not."

That no doubt is perfectly accurate, but, as was pointed out by FARWELL, L.J., in *A.-G.* v. *Birmingham, Tame & Rea District Drainage Board* (2), *London County Council* v. *A.-G.* (1) decided no more than that:

> "It is for the Attorney-General to determine whether he should commence litigation, but it is for the court to determine what the result of that litigation shall be . . . That is to say, the court cannot say: 'You ought never to have instituted these proceedings': it must listen to his application, and then adjudicate whether there should be an injunction granted or not."

In my judgment it is the duty of the court in making this adjudication to exercise its discretion quite independently of the discretion exercised by the Attorney-General. He is for this purpose in no better position to obtain judgment in his favour than any other litigant claiming an injunction.

In *A.-G.* (*on the relation of Hornchurch U.D.C.*) v. *Bastow* (3), DEVLIN J., points out that:

> ". . . the fact that the Attorney-General asks for the injunction does not mean that the court has to grant it, even if a clear and deliberate invasion of a public right is proved. The court still has its discretion in the matter and it must have regard to the circumstances to which it usually has regard in considering whether or not it will grant this type of relief."

(1) 66 J.P. 340; [1902] A.C. 165.
(2) 76 J.P. 481; [1912] A.C. 788.
(3) 121 J.P. 171; [1957] 1 All E.R. 497; [1957] 1 Q.B. 514.

It is true that towards the end of his judgment there occurs the passage on which counsel for the plaintiff relies. It reads as follows:

> " I distinguish, therefore, between administrative discretion and judicial discretion. The Attorney-General . . . is the officer of the Crown who is entrusted with the enforcement of the law. If he, having surveyed the different ways that are open to him for seeing that the law is enforced and that it is not defied, has come to the conclusion that the most effective way is to ask this court for a mandatory injunction . . . then I think that this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances."

But DEVLIN, J., added:

> " I am dealing . . . purely with that type of case in which the only substantial ground for not giving an injunction is that there are other remedies available. In cases where other circumstances arise which are not primarily a matter for administrative discretion, then different considerations might apply and a different view be taken."

In that case the defendant's acts in their nature tended indubitably to injure the public. The only real question for decision was one which may be regarded as primarily a matter of administrative discretion, namely, whether there were other remedies available more appropriate than an injunction.

The present case, however, in my view depends on whether what the defendants are doing in any way injures the public; and this is not a matter on which the discretion of any officer of the Crown can have any influence on the court. I have no hesitation in holding on the special circumstances of this case that the defendants have caused no injury to the public. I do not, however, hold that there are any means available other than an injunction to prevent these defendants from doing what they are doing.

This seems to me to be a similar case to *A.-G.* v. *Kerr & Ball* (1) where LUSH, J., refused an injunction although there had been persistent breaches of certain bye-laws on the ground that no public injury had been suffered, and that in all the circumstances of the case it was not desirable that an injunction should be granted. It was sought to distinguish that case from the present on the ground that it concerned breaches of bye-laws whereas this case concerns breaches of a public Act of Parliament. I cannot think that that distinction makes any difference. Indeed LUSH, J., points out that bye-laws impose a public duty and that their breach is prima facie a public wrong although on the facts of that case the breaches did not in reality injure the public.

It is further argued on behalf of the Attorney-General that if in a relator action he can show a clear and deliberate breach of an Act of Parliament, then an injunction is granted as a matter of course, not only on the ground with which I have already dealt, namely, that the court is virtually bound by the exercise of the Attorney-General's discretion, but also on the ground that the doing of the acts prohibited by statute is deemed to constitute a public injury and it is not competent for the courts to inquire whether or not such acts in fact injure the public. This contention is difficult to reconcile with the two decisions in *A.-G.* v. *Kerr & Ball* (1), and with the observations of DEVLIN, J., in *A.-G.* v. *Bastow* (2). It does, however, at first sight appear to gain some support from certain dicta relied on by counsel for the plaintiff, if those dicta are looked at out of their context. When, however, they are considered in their

(1) (1915), 79 J.P. 51.
(2) 121 J.P. 171; [1957] 1 All E.R. 497; [1957] 1 Q.B. 514.

context, and that context is analysed, they do not in my judgment establish counsel's contention. He relies particularly on the following passage from the judgment of SIR GEORGE JESSEL, M.R., in *A.-G.* v. *Cockermouth Local Board* (1) which reads as follows:

> " . . . it is not necessary for the Attorney-General to prove actual damage. The legislature says that certain acts are calculated to produce an injury; and that is sufficient.

In that case the defendants had constructed works for the removal of the sewage of Cockermouth with an outfall into the River Derwent outside the defendants' district and in that of the Workington Local Board. This the defendants were empowered to do only by virtue of certain Acts of Parliament which in effect imposed a condition that the defendants should not impair the purity of the water in the river. The sewage polluted the river at a point—eight miles from the town of Workington—where it entered the river. No polluted water, however, arrived at the town of Workington. It was held on the information at the relation of the clerk of the Workington Local Board that an injunction should be granted but that the bill of the local board of Workington alleging nuisance must be dismissed.

The basis of the decision stated by the Master of the Rolls was that as the Act of Parliament gave the defendants the power only on certain terms of doing something which would otherwise be illegal, that is, the discharging of sewage into the river outside their own district, they could not take that power without observing the terms on which it was granted. The Master of the Rolls, in making the observations on which counsel for the plaintiff relies, was I think only pointing out that in the circumstances of the case it mattered not so far as the case for an injunction was concerned that the defendants' breach caused no nuisance to the inhabitants of the town of Workington. Moreover, as was stated by FRY, J., in the case to which I next refer, the pollution of the river was something which in its nature tended to the public injury.

In *A.-G.* v. *Shrewsbury (Kingsland) Bridge Co.* (2), the defendants without any power did certain acts which undoubtedly tended in their nature seriously to interfere with public rights, and so tended to injure the public. These acts consisted of driving piles into the River Severn for the construction of a bridge and interfering with a public highway and with the towing path of the river; no evidence was called of actual damage to the public by reason of these acts. Since, however, the defendants' acts in their nature tended to the public injury it was unnecessary for the plaintiff to adduce evidence of actual injury. It is to be observed that in that case there was no evidence called by the defendants, nor on the facts of the case could there have been any acceptable evidence, that public injury had not been caused or was not to be apprehended from the defendants' acts. There seems to be a sensible difference between what the defendant company did in that case, and what the defendants have done in this case. The basis of FRY, J.'s decision to grant the injunction was that the defendant company's acts were not only illegal but were acts which in their nature tended to injure the public.

In *A.-G.* v. *London & North Western Ry. Co.* (3), the Trent Valley Railway Act, 1845, incorporating the Railways Clauses Consolidation Act, 1845, empowered the defendants to carry their railway across a certain highway providing they ran their trains over the crossing at no more than four miles per hour. The defendant company exercised the power and then proceeded

(1) (1874), 38 J.P. 660.
(2) (1882), 21 Ch.D. 752.
(3) 63 J.P. 772; [1900] 1 Q.B. 78.

to run 120 trains in every twenty-four hours over the crossing at speeds much in excess of four miles per hour. In the action it was contended by the defendants that the public was not injured by the speed of the trains, and indeed if the trains ran over the crossing only at four miles per hour the crossing would be closed to the public for much longer than under the system thus operated by the defendants. The court granted the injunction and counsel for the plaintiff relies on the following passage in the judgment of A. L. SMITH, L.J.:

> "... the legislature having prohibited the running of trains over this crossing which adjoins a railway station at a greater ... speed than four miles an hour, the question whether it is for the benefit of the public to run trains over it at a greater speed is one with which we in a court of law have nothing to do."

This passage also must, however, be considered in its context. The basis of the decision stated in the judgments of the Court of Appeal was that to run a train across a highway without statutory permission was an act which in its nature tended to injure the public, and indeed constituted a serious public nuisance. The defendant company had statutory permission to run its trains across the highway but only on condition that it did so at no more than four miles per hour. In breaking this condition the defendant company was committing a nuisance in a highway and was unable to defend itself by showing that it was complying with the terms on which it had statutory permission to cross the highway. In these circumstances it was not germane for the court to consider whether a speed in excess of four miles per hour benefited or injured the public.

Notwithstanding that the Attorney-General has exercised his discretion in bringing the action, and that the defendants have contravened the provisions of a statute, in my judgment it is the duty of the court in all relator actions to inquire whether the acts done by the defendants in truth injured the public. If they did, the fact that the injury was small would not, providing it was real, entitle the court to withhold an injunction; *A.-G.* v. *Wimbledon House Estate Co., Ltd.* (1). Nor would it be germane that the public, though injured, may have received some compensating advantage from the defendants' acts; *A.-G.* v. *London & North Western Ry. Co.* (2). If, however, it is established that the public has in fact suffered no injury as a result of the defendants' acts, the court may in the exercise of its discretion refuse an injunction. In every reported case the acts relied on by the plaintiff in actions such as these have clearly tended to the public injury. I have moreover searched the reports in vain for any relator action in which the acts complained of were as trivial as, or even approached the triviality of, the acts relied on in this action.

Undoubtedly it is only in the most exceptional circumstances that any statutory provision can be contravened without public injury. The circumstances of this case are, however, most exceptional. The acts done by the defendants do not on the very special facts of this case tend to injure the public, and indeed I am completely satisfied that no member of the public has been in the slightest degree inconvenienced by the defendants. I am uneasy, too, about the circumstances in which the prosecutions were originally launched. I do not consider that in all the circumstances of this case an injunction should be granted, and in the exercise of my discretion I refuse an injunction. There will be judgment for the defendants.

Judgment for defendants.

Solicitors: *Sharpe, Pritchard & Co.*, for *Town Clerk*, Manchester; *Julian S. Goldstone & Co.*, Manchester. G.A.K.

(1) 68 J.P. 341; [1904] 2 Ch. 34.
(2) 63 J.P. 772; [1900] 1 Q.B. 78.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

May 11, 1959

R. *v.* HARMAN

Criminal Law—Appeal—Sentence—"Order . . . made on conviction"—Failure to surrender to bail—Estreat of recognisance—Term of imprisonment in default—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 21.

The appellant was committed for trial on charges of office-breaking and larceny, being granted bail in his own recognisances in the sum of £100. He failed to surrender to his bail and was subsequently arrested. At the trial he pleaded Guilty and was sentenced to three years' imprisonment. The court further ordered that his recognisance be estreated, and that, in default of payment, he should serve a further term of six months' imprisonment consecutive to the three years. On appeal against the sentence of six months,

HELD: "any order . . . made on conviction with reference to the person convicted" in the definition of "sentence" in s. 21 of the Criminal Appeal Act, 1907, meant any order made in consequence of conviction; the sentence of six months in default of payment of the estreated recognisance had nothing to do with the conviction; and, therefore, the Court of Criminal Appeal had no jurisdiction under s. 3 (c) of the Act of 1907 to hear the appeal.

R. v. *London Sessions, Ex p. Beaumont* (1951), 115 J.P. 104, approved.

APPEAL against sentence.

The appellant, James Alfred George Harman, had been granted bail in his own recognisance of £100 while awaiting trial at the County of London Sessions on two charges of office-breaking and larceny committed on July 18, 1958. He did not surrender to his bail and was arrested on Jan. 15, 1959. At his trial on Feb. 10, 1959, he pleaded guilty to the charges and was sentenced to three years' imprisonment, and his recognisance of £100 was ordered to be estreated. Later that day the chairman told the appellant that the alternative, if he failed to pay the £100, would be a further six months' imprisonment consecutive on the sentence of three years' imprisonment already passed on him. The appellant appealed against that further sentence of six months' imprisonment.

P. A. Bruce for the appellant.

Cassel for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant, together with two other men, pleaded guilty at London Sessions to office-breaking and larceny, and he was sentenced to three years' imprisonment. Apparently, he was on bail at the time of his committal and he failed to surrender, and, in sentencing him to three years' imprisonment, the learned chairman said this:

> "For this offence I think the appropriate sentence is that you go to prison for three years. Your recognisance will be estreated; and you will have to report within the provisions of the Criminal Justice Act."

Later on that day, the chairman, addressing the appellant, said:

> "Harman, I estreated your recognisance of £100 this morning, but I omitted to tell you what the alternative is if you do not pay. The alternative is a further six months, to be consecutive to the three years to which I sentenced you."

The appellant now appeals to this court, not against his sentence of three years' imprisonment, but against what he says is a sentence of six months' imprisonment consecutive on the three years if he does not pay the £100. As is

well known, the jurisdiction of this court is limited by the Criminal Appeal Act, 1907, and, in regard to sentences, the jurisdiction is given by s. 3 in these terms:

> "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal . . . (c) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

By s. 21 of the Act of 1907, the definition section:

> "The expression 'sentence' includes any order of the court made on conviction with reference to the person convicted . . ."

On that, counsel for the appellant says that, whatever may have happened in any other case, in this case the order of six months' imprisonment was an order of the court made on conviction, that is at or about the time of conviction and with reference to the person convicted. That, no doubt, is true, but it seems perfectly clear to this court, quite apart from authority, that, where s. 21 of the Act of 1907 says "any order of the court made on conviction", it must mean "made as a consequence of conviction". Indeed, the matter has already come before the Divisional Court, in *R.* v. *London Sessions, Ex p. Beaumont* (1), in regard to corresponding words in s. 36 (2) of the Criminal Justice Act, 1948. By s. 36 (1): "A person convicted by a court of summary jurisdiction shall have a right of appeal . . ." Section 36 (2) reads:

> "For the purpose of the last foregoing subsection, the expression 'sentence' includes any order made on conviction by a court of summary jurisdiction . . ."

In *R.* v. *London Sessions, Ex p. Beaumont* (1) the Divisional Court held that the words "any order made on conviction" meant any order made as a consequence of a conviction and not an order made at the time of conviction.

The court feels that the present case is a very plain case and that the sentence of six months' imprisonment had nothing to do with the conviction. It may have been given at the time of, and while, sentencing the appellant on conviction, but it had nothing to do with the conviction, any more than if he had been acquitted and the recognisance had been estreated and a period of imprisonment ordered in default of payment. Accordingly, there is no jurisdiction in this court to entertain the appeal and it is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal*; *Director of Public Prosecutions.*

T.R.F.B.

(1) 115 J.P. 104; [1951] 1 All E.R. 232; [1951] 1 K.B. 557.

COURT OF APPEAL

(LORD EVERSHED, M.R., WILLMER, L.J., and CASSELS, J.) May 8, 1959
(LORD EVERSHED, M.R., ORMEROD and WILLMER, L.JJ.) May 12, 13, 14, 1959

ARMSTRONG *v.* SHEPPARD & SHORT, LTD.

Sewer—Trespass—Construction on plaintiff's land—Oral permission by plaintiff while ignorant of proprietary right—Permission revoked after sewer constructed—Continued discharge of effluent.

The plaintiff was the owner of a house at the back of which was a private pathway leading from the public highway to premises owned by the defendants. The strip of pathway behind the plaintiff's house, and adjoining the highway, was part of his property. In 1957 the defendants wished to construct a sewer under the pathway from their premises to the public sewer in the highway. Before proceeding with the work, they asked the plaintiff (among others) for his permission. The plaintiff orally raised no objection to the construction of the sewer or to the construction of a manhole on the strip of the pathway which belonged to him, but, at that time, he was not aware that that piece of the pathway was his own property. In August, 1958, the plaintiff, having learned that he was the owner of the strip of pathway where the manhole had been constructed, requested the defendants to remove the sewer and the manhole. The defendants having failed to comply with his request, the plaintiff brought an action against them, claiming damages for trespass and an injunction to restrain the further discharge of effluent through the sewer.

HELD: (i) the plaintiff was not debarred by acquiescence from enforcing his legal rights because he had not known that he owned the strip of land at the time when he gave his assent; but an injunction would, nevertheless, not be granted in aid of his legal right, because any injury to the plaintiff was trivial, and for the same reason the award of nominal damages of 20s. was adequate; (ii) the plaintiff's oral assent to the construction of the manhole and sewer was sufficient answer to his claim in trespass, but was not sufficient answer to a claim for discharging effluent through the plaintiff's land, because such a right could not be granted validly by parol, and, if the plaintiff had given a licence permitting the discharge of the effluent, it was not irrevocable and had been revoked by the letter of the plaintiff's solicitors.

APPEAL by the plaintiff, Henry Albert Armstrong, from an order made by His Honour JUDGE HARGREAVES at Willesden County Court. By a CROSS-APPEAL the defendants, Sheppard & Short, Ltd., served notice that, on the hearing of the plaintiff's appeal, they desired to contend that the judgment should in any event be reversed or varied, and that judgment should be entered for them.

By his particulars of claim, the plaintiff, after stating that he was the registered proprietor of the property known as No. 2, Priory Close, Wembley, Middlesex, alleged that on or about Dec. 6, 1957, the defendants wrongfully entered his land, excavated part thereof, and constructed a sewer and manhole thereon; and that, since about January, 1958, the defendants had discharged or caused or permitted to be discharged sewage or effluent through the sewer and threatened to continue to do so. The plaintiff claimed: (i) damages limited to £400; and (ii) an injunction to restrain the further discharge of effluent through his land. The defendants, by their defence, alleged that the plaintiff gave an oral licence to them to excavate the land in the passage-way at the rear of his property and to construct a sewer and manhole thereon, and that, therefore, the plaintiff was not entitled to complain of the matters set out in the particulars of claim. The learned judge found that the plaintiff had intimated to the defendants that he had no objection to the construction of the sewer; that, at the time of the intimation, the plaintiff did not know that he was the owner of any part of the passage-way under which the sewer was to be constructed; and that the plaintiff had made no objection while the work was actually in progress and had proved no actual damage. The judge held that, in the absence of permission, the defendants

had committed trespass on the plaintiff's property for which the plaintiff was entitled to nominal damages; and that the plaintiff was not entitled to an injunction; and he gave judgment for the plaintiff in the sum of 20s. for damages and the costs of his action.

The appeal came on for hearing on May 8, 1959, before LORD EVERSHED, M.R., WILLMER, L.J., and CASSELS, J., and argument on the appeal was concluded at that hearing. The cross-appeal came on for hearing on May 12, 1959, before LORD EVERSHED, M.R., ORMEROD and WILLMER, L.JJ.

D. G. Scott for the plaintiff.

Machin for the defendants.

LORD EVERSHED, M.R.: This appeal and cross-appeal have taken an unusual course, owing to the necessary change in the constitution of the court after the hearing of the appeal. I can only hope that the result has not been to increase the difficulties or the costs of the parties concerned.

The case has certainly not been without interest or without difficulty. The facts of the appeal are, briefly, these. The plaintiff is the owner and occupier of certain premises known as 2, Priory Close, Harrow Road, Wembley. It appears from the entry in the register at the Land Registry that the plaintiff has charged his interest by way of mortgage; and the significance of that fact lies in this, that the documents of title which he might have held at the relevant time were in the possession of the chargee. The plan which I have before me, and which is attached to the entry on the register, shows that the plaintiff's house is at the extreme end of Priory Close, that is, at its south-east end, where Priory Close goes into Priory Avenue. At the back of the plaintiff's house is a pathway, or roadway, made up, not being a public highway. That pathway goes at the back of a number of houses and leads to premises now owned and occupied by the defendants, Sheppard & Short, Ltd. The little strip of that pathway which (so to say) matches the plaintiff's house and garden is at the end of that passage nearest to Priory Avenue. At the end of 1957 the defendants conceived the idea that it would be to their advantage to construct a drain, or sewer, from their premises, and leading to the public sewer in Priory Avenue. The drain was not required to carry any great quantity of foul water. The defendants were concerned only with one water closet and one urinal; but they also wished to carry away the storm water, which would collect on their building, in the same manner to the sewer in Priory Avenue. They constructed, accordingly, a manhole and made the necessary excavations for the sewer; and they also constructed the sewer. The manhole is, in fact, situated on the little strip, which belongs to the plaintiff and which I have described as being the strip at the extreme end of the passage-way nearest to Priory Avenue. That was done, and it was concluded by the end of 1957. Thereafter, the defendants passed the foul and storm water down this drain into the public sewer in Priory Avenue.

On Aug. 20, 1958, the plaintiff, through his solicitors, wrote to the solicitors for the defendants a letter which, after stating who the writers were, continued as follows:

> " Our client [the plaintiff] further instructs us that he has at no time been approached by the defendants for permission or been advised of their intention, and has given no permission or licence of any kind. We write on behalf of [the plaintiff] to require that the sewer and manhole be removed forthwith from his premises, the premises be made good, and [the plaintiff] compensated in damages for the trespass. Alternatively, [the plaintiff] will have no alternative but to take such steps as may be necessary to stop the unauthorised flow of effluent across his land."

The reply from the defendants' solicitors denied the assertion that no permission of any kind had been given. Unfortunately that was not satisfactory to the plaintiff, and the present proceedings were begun in October, 1958. The particulars of claim alleged (i) that the plaintiff was at all material times the registered proprietor of 2, Priory Close; (ii) that on or about Dec. 6, 1957, the defendants wrongfully entered and excavated part of his land and constructed a sewer and manhole; and (iii) that since January, 1958, the defendants had discharged or caused or permitted to be discharged effluent through the sewer under the land. The plaintiff claimed damages for trespass (but limited to the sum of £400); and he also claimed an injunction against the further discharge of effluent through or under his land.

The matter came on for trial in December, 1958, a year after the entry complained of. It is quite plain from the evidence given by the plaintiff that he continued to assert that he had never given any assent to or permission for what the defendants had done. According to the learned judge's note, the plaintiff said:

> "I have never given consent for the manhole and I had no knowledge it was to be built. I did notice it being done on two or three occasions. On the first, the construction of it was well on the way. I did nothing at all about it. I was not approached by anyone for consent."

I must say in clear and unqualified terms that that evidence was false, according to the judge's finding. The learned judge held, after hearing the evidence (and, in particular, the evidence of the representative for the defendants, a Mr. Sheppard), that there had been clear permission or assent given to what was being done. Mr. Sheppard described the interview with a little detail. He said that the plaintiff pointed out that he himself was in the business of a sanitary engineer, which took him all over the country, and he fully understood the defendant's difficulty. It must, however, be conceded that the defendants were somewhat rash over this matter. They had first made a mistake, apparently, in supposing that a Mr. Neilson was the owner of the whole of the relevant property. No doubt that mistake put them in a difficulty. They had to see, and according to the evidence saw, a number of house-owners whose properties back on to this strip; but they were content—rashly, as I have ventured to say—to leave it on the footing that they supposed that they had been properly authorised, by all the persons interested, to construct the sewer and to pass this effluent down it. The learned judge found that they were justified in supposing that, so far as the plaintiff was concerned, he knew what his rights and position were and had deliberately consented to what the defendants were doing. The plaintiff, however, though baulked in his attempt to establish that he had never spoken to anybody about it, also gave evidence of the fact that, at the time when this was going on and when (as eventually was found) he gave his assent to the defendants, he was unaware that he had any proprietary right in respect of this strip—he did not, apparently, use it himself—and, therefore, he must be taken to have been unaware that he had any interest or concern which was involved when his permission was asked or that he could refuse his consent or qualify it.

The part of the learned judge's judgment dealing with that is as follows:

> "I accept the [defendants'] evidence that there was a telephone conversation between [them] and the plaintiff, and I accept the [defendants'] evidence that [they] understood the plaintiff to have given [them] permission to go ahead with the work of constructing the sewer; but I also accept the plaintiff's evidence that he did not give the [defendants] such permission. My reason for both conclusions is the same, that the plaintiff, not having seen

the deeds of his property for some time and forgetting the contents of the deeds and the exact boundary of the plan, did not realise when he spoke to the [defendants] that he, the plaintiff, was the owner of any part of the said pathway. This being so, he would naturally not give permission to the [defendants], because he did not know he had the right to do so; neither, however, would he object, because he would not know he had the right to object either. Consequently, I feel safe in taking the view that the plaintiff is right in saying that he never actually gave permission for the sewer to be constructed, but that the [defendants are] correct in saying that the plaintiff made it clear, whatever words he used, that he was not objecting to it."

To some extent the distinction is one more of words than of substance. It is clear, however, that what the judge meant was that the plaintiff did not give permission, in the sense that he did not purport, qua owner, to give authority or a licence to the defendants to do something on his land. On the other hand, the learned judge found that the plaintiff made it quite clear, and that the defendants were well justified in so assuming, that he was raising no kind of objection to the proposed course of construction. In those circumstances, the learned judge at the trial declined to grant any injunction, either to remove the manhole or to restrain the effluent being sent down. He also held that the damage suffered from the trespass which, on the view that he took, he thought must technically have been committed, was purely nominal. He therefore said:

" Taking the view, as I do, that it is reasonable for the plaintiff to desire that his position should be clarified, I award him costs on Scale 2."

By the notice of appeal the plaintiff submitted that the learned judge should have granted an injunction, in the terms of the claim, to restrain the discharge of the effluent down the sewer. The short basis of the case made for an injunction was this: A proprietor who establishes a proprietary right is, ex debito justitiae, entitled to an injunction, unless it can be said against him that he has raised such an equity that it is no longer open to him to assert his legal or proprietary title. In this case (said counsel for the plaintiff) it is of the essence of the judge's finding that the plaintiff did not know that he had the proprietary right which would be affected by the suggested licence, and, therefore, no such equity is raised against him which will deprive him of his prima facie right to an injunction. Further, the plaintiff said that 20s., which was derisory damages, was quite inadequate by way of compensation for the interference with his proprietary right. We heard the argument on that appeal, the court being constituted by myself, WILLMER, L.J., and CASSELS, J.; and the argument on that appeal was concluded. CASSELS, J., was unable to sit further, and, therefore, the court was reconstituted, and ORMEROD, L.J., joined WILLMER, L.J., and me for the purpose of hearing the cross-appeal, the substance of which was that, in the circumstances and for reasons which will be dealt with when I deal with the cross-appeal, the learned judge should have dismissed the plaintiff's action altogether. Owing to this change in the composition of the court, it is necessary in this case to distinguish clearly between the appeal and the cross-appeal, and, in order to remove possible doubts, I thought that it might help if I wrote a statement of the points raised and submitted it to the learned counsel in the case for approval. They said that they approved it, and it may be worth while my incorporating in this judgment the statement which I made. It is as follows:

" On the appeal counsel for the plaintiff contended (a) that the judge should have granted the injunction prayed, and (b) that the damages awarded (i.e., nominal damages of 20s.) were too low. On the appeal the court

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([myself], WILLMER, L.J., and CASSELS, J.) have intimated their rejection of the appeal, but have treated the damages awarded as referable to the entry and excavation or (at most) to the alleged trespass up to the date of the hearing.

"On the cross-appeal counsel for the defendants contends that the action should have been dismissed on the ground that the 'approval' given by the plaintiff as found by the judge prevents him complaining that the acts of entry and excavation (and any other acts covered by the award of 20s. damages—see above) were trespasses: and [counsel] further contends that such 'approval' also prevents [the plaintiff] (personally) complaining of any use of the pipes laid by the defendants for the (obvious) purpose for which they were laid. Counsel for the defendants concedes that, unless he is right on his wider contention, the plaintiff may bring fresh proceedings founded on trespass or may himself interfere with the manhole and pipes. Counsel for the defendants further concedes (for present purposes) that the plaintiff's 'approval' does not extend in effect to the plaintiff's successors in title. The question, therefore, to be debated on the cross-appeal is whether, on the facts proved or found, the effect of the plaintiff's 'approval' is to prevent him personally complaining (on the ground of trespass) of the defendants' acts in entering on and excavating the land and installing the pipes and manhole and also in using the manhole and pipes in the ordinary course for the purposes for which they were installed."

For the present purposes, the most important sentence is: that it has been accepted by the court that the damages awarded in the action must be treated as referable, and referable only, to the entry and excavation, or, at most, to any alleged trespass (by discharge of effluent) up to the date of the hearing.

I now, therefore, come back to give the reasons for the conclusion which I have earlier indicated that the appeal fails. The proposition of counsel for the plaintiff, in general, must, I think, be accepted. First, it is true to say that a proprietor will not be debarred, on the ground of acquiescence, from asserting his legal rights against one who is shown to have infringed them, unless it is also clear that, at the time when he did so acquiesce, the proprietor was aware of his proprietary rights. There is substantial authority for that view, such as *Ramsden* v. *Dyson* (1) and the judgment of FRY, J., in *Willmott* v. *Barber* (2). It is, therefore, in this case, I think, well said by counsel for the plaintiff that the absence of an essential knowledge, as found by the judge, in December, 1957, prevents the erection against the plaintiff of an equity which would bar him from asserting, for any purpose, his legal title. Secondly, it is true to say that, if a man, having a proprietary right, proves an infringement of that right, prima facie he is entitled to an injunction, but that needs some qualification. It is not a matter of unqualified right; and one ground for denying an injunction would be that the wrong done is, in the circumstances, trivial. That proposition is founded on *Imperial Gas Light & Coke Co.* (*Directors, etc.*) v. *Broadbent* (3) but I can, I think, summarise it by reading from KERR ON INJUNCTIONS (6th Edn.) (1927) at p. 30:

"After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case, such as laches, or where the interference with the plaintiff's right is trivial."

(1) (1866), L.R. 1 H.L. 129.
(2) (1881), 17 Ch.D. 772.
(3) (1859), 23 J.P. 675; 7 H.L. Cas. 600.

The learned judge (be it observed) was here dealing with the claim as I have formulated it, and he came to the conclusion that the circumstances of this case were special, and, as his judgment shows, that the damage was trivial. For the latter statement, he was supported by the plaintiff himself, who said in evidence that he had suffered no inconvenience whatever from what had been done. But there were other good grounds, and formidable grounds (as I think), for refusing the plaintiff an injunction. That he misled the defendants is beyond a peradventure. It is no less clear that he attempted to mislead the court. He asserted—contrary to the fact—that he had never had any conversation with the defendants about the matter at all; and in his evidence-in-chief he so swore, untruly. It is not, therefore, at all surprising that the learned judge came to the conclusion that he should grant no equitable relief; and, in my judgment, on the facts of this case he was well entitled to take that view. Nor, on the evidence, does it seem to me that the plaintiff can complain of the award of 20s. damages. He proved none. He said (as I have mentioned a moment ago) that he had suffered no inconvenience whatever; and one has only to look at the picture and have some comprehension of the circumstances and facts to realise that he could not have suffered the slightest inconvenience—all the more since, as he says, he never uses the pathway.

There is, however, one matter which clearly was not, I think, dealt with. The passing the effluent down the sewer, as distinct from the work of construction, does involve (and I am now approaching a point which must be dealt with more fully on the cross-appeal) something which is in the nature of a proprietary interest, in the nature of an easement—a right to pass effluent under somebody's land; and if it is a right in respect of which the plaintiff's land must become, so to speak, a servient tenement, then I think that a case might well have been put for saying, under Lord Cairns' Act (the Chancery Amendment Act, 1858), that there should be an award of monetary compensation referable to the qualification which would thereby be imposed on the title of the plaintiff as absolute owner. It is, however, quite clear that the learned judge was not invited to consider Lord Cairns' Act. As I have said, the damage (as has been agreed before us) must be treated as having been limited to the technical trespasses, such as they were—that is to say, assuming that the cross-appeal did not succeed, to the excavations and the discharge of effluent up to the hearing.

The result of what I have said, therefore, is that the appeal fails. Counsel for the plaintiff has not persuaded me that he is entitled to an injunction, and he has not persuaded me that there is anything wholly wrong with the award of damages as compensation for the alleged trespasses up to the date of the hearing. It follows, therefore, that the appeal should be dismissed. I have been authorised by **CASSELS, J.**, to say that he agrees with the conclusion which I have stated, and with my reasons.

WILLMER, L.J.: I also agree that the appeal should be dismissed, for the reasons stated by my Lord; and I do not desire to add anything further on the appeal.

LORD EVERSHED, M.R.: I now proceed to deal with the cross-appeal. I have indicated that its purpose was that the action should have been dismissed. The form of the notice given was:

> " . . . the [defendants desire] to contend that the . . . judgment should in any event be reversed . . . so far as it directs that there should be judgment for the plaintiff for £1 with costs . . . And . . . the [defendants propose] to ask the Court of Appeal to enter judgment . . . for the defendants . . ."

To enter judgment, that is to say, that the action should be dismissed altogether.

I shall treat as incorporated also in this judgment the memorandum which I gave to counsel and with which they agreed, because it states what was the point which counsel for the defendants has put before us with great care. His point was shortly this. He said, in effect: "I am only concerned to resist an action for common law trespass: if, therefore, I can establish that the subject-matter of which the plaintiff complains was not without lawful justification, that is an answer to the plaintiff's action; and I say that that of which the plaintiff complains had lawful justification, for the plaintiff himself approved it: he approved the entry on his land for the purpose of excavating that land and inserting a sewer and a manhole, and, particularly since the plaintiff himself appeared to be in the same line of business, he certainly must have supposed that the pipe was not put into the land merely for the fun of it but was put there in order that effluent of some kind could be passed through it." Counsel went further and said that the plaintiff would have known exactly what the whole purpose of the operation was: that, therefore, it could not be said by the plaintiff that the entry and excavation, and the natural and intended consequences thereof, were without justification; and that that was an answer to an action for trespass. Counsel for the defendants has not contended that, if he is right, he can do other than answer an action brought by the plaintiff. He would not suggest that, if the plaintiff were to sell his property, the buyer would be affected by the permission, authority—whatever the right word is—which the plaintiff gave. But he does say that the plaintiff, having authorised what the defendants did, and having, therefore, authorised the obvious and intended consequences, cannot complain at common law.

There is much attraction in the argument, particularly on the facts found; and it is not easy to put out of one's mind that the plaintiff attempted to say that he never knew anything about it. In support of the argument counsel for the defendants has taken us through a series of cases, beginning with *Webb* v. *Paternoster* (1). We looked at that case and at later cases which I will just mention: *Wood* v. *Lake* (2); *Winter* v. *Brockwell* (3); *Tayler* v. *Waters* (4); *Hewlins* v. *Shippam* (5); *Wallis* v. *Harrison* (6); *Wood* v. *Manley* (7); down to the well known and classic case, *Wood* v. *Leadbitter* (8). Finally, we looked at *Winter Garden Theatre (London), Ltd.* v. *Millenium Productions, Ltd.* (9), and at a dictum of DENNING, L.J., in *Bendall* v. *McWhirter* (10).

It is, I think, true to say (and these cases establish it) that, if A. gives authority to B. for the doing of an act on A.'s land and the act is done and completed, then, whatever be the strict description of the authority, whether it be called a permission or a licence, it is, generally speaking at any rate, too late for A., who gave the authority, to complain of it. And that will go to this extent—that a man may by such means extinguish a proprietary right: for example (to quote an instance from the cases), if I, having an easement of light, permit another to come and build a wall up against my window, so as to extinguish the easement, if the wall

(1) (1619), 2 Roll. Rep. 143, 152.
(2) (1751), Say. 3.
(3) (1807), 8 East. 308.
(4) (1816), 7 Taunt. 374.
(5) (1826), 5 B. & C. 221.
(6) (1838), 4 M. & W. 538; (1839), 5 M. & W. 142.
(7) (1839), 11 Ad. & El. 34.
(8) (1845), 9 J.P. 312; 13 M. & W. 838.
(9) [1947] 2 All E.R. 331; [1948] A.C. 173.
(10) [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466.

is built and completed that may well be the end of it, and I cannot complain of the infringement of my ancient light or require the wall to be taken down.

The effect of these cases was for this purpose sufficiently well stated in GALE ON EASEMENTS (11th Edn.) (1932) at p. 67. After a very full discussion of the cases to which counsel for the defendants referred us, it is there stated:

> "The result of the common law authorities above referred to was thus in effect stated by Mr. Gale: 'A man may in some cases by parol licence relinquish a right which he has acquired in addition to the ordinary rights of property and thus restore his own and his neighbour's property to their original and natural condition'."

I intervene there to say that that is obviously a reference to *Liggins* v. *Inge* (1), to which counsel for the defendants drew our attention. In that case, the plaintiff's father approved a neighbour's so altering an embankment to a watercourse that the water which had formerly flowed to the plaintiff's mill was diverted to the neighbour's (the defendant's) property. The actual doing of the work was no trespass, for the bank was wholly on the defendant's property: but the point is that, once the work had been done, then the consequence followed that a previously enjoyed right of receiving water had been pro tanto lost—just as, if one allows another to build against one's window, one may lose an ancient right of light. But I observe that in these cases (so far as I can see) it is always assumed that the plaintiff giving the licence knew what his real rights were. I continue to read from GALE ON EASEMENTS (11th Edn.) at pp. 67, 68:

> "'But he cannot by such means impose any burden on land in derogation of such ordinary rights of property'. Thus, a parol licence given by B, the owner of land (the servient tenement), to A, the owner of a neighbouring house (the dominant tenement), to turn a spout of water from the house on to the land, will be revocable. On the other hand, supposing in such a case the house to contain ancient windows, a parol licence given by A to B to build a wall on B's land in front of A's ancient windows will be irrevocable once the wall has been built. It would seem, however, that, in order that a parol licence should so operate, the act licensed should be executed, and the necessary consequence of such execution should be per se the extinguishment of the right to light. For the cases do not appear to furnish any authority for saying that where the extinguishment of an easement would depend upon a repetition of the licensed acts, a parol licence would be sufficient to effect it. Indeed, where the acts from their nature lie in repetition such licence could not be executed."

I would add that that statement finds later support, I think, in the speeches of VISCOUNT SIMON and LORD PORTER (to which counsel for the plaintiff referred us) in *Winter Garden Theatre (London), Ltd.* v. *Millenium Productions, Ltd.* (2).

If that is a right summary, it follows that counsel for the defendants is entitled to say that the plaintiff cannot complain of the alleged trespass consisting of the defendants' acts of entry on his land in December, 1957, making holes in it and putting a sewer and a manhole in it; and I agree with him that, in an action of common law trespass, it does not, in the circumstances here, matter that the plaintiff was unaware of his proprietary rights when he gave permission: the thing is done: and it has had the lawful justification (in so far as this case is concerned) that it was done with the approval of the man who now tries to

(1) (1831), 7 Bing. 682.
(2) [1947] 2 All E.R. 331; [1948] A.C. 173.

complain about it. It follows from that conclusion (as counsel for the plaintiff conceded) that the plaintiff cannot complain of the presence in the land now of the physical things, the manhole and pipes; indeed, as counsel for the defendants conceded, they belong in law to the plaintiff, there having been no agreement or arrangement made which would alter the ordinary consequence that that which is put into a man's land becomes part of that man's property. But that only goes to deal with the matter of the original entry and the physical things, the manhole and sewer. What of the passage of effluent, which is the subject of para. (iii) of the particulars of claim? For unless counsel for the defendants can satisfy us that he can also find an answer to the allegation of trespass by means of the discharge of effluent, then he cannot succeed, as it seems to me, in disposing of the award of 20s. damages and the consequences as regards costs in the action. He cannot, in other words, invite us to set aside the judge's judgment and dismiss the action.

In my judgment, counsel for the defendants cannot succeed on this part of his case. It seems to me, after a review of the authorities, that two propositions stand forth. First, if the subject-matter which is alleged to have been granted is an interest in land, then it cannot be done by parol only. A licence coupled with a grant, if it is effectively done, will, no doubt, be irrevocable; but there is nothing in the authorities which counsel for the defendants cited to support the view that a right to pass water through another's land—which is, as I conceive, a proprietary right—is capable of grant by parol. Secondly, such a permission to pass effluent down a man's land might be, as a matter of contract, properly covered as between one individual and another, and it is on that part of it that perhaps counsel for the defendants concentrated; for he said that he was only concerned to show that the plaintiff in this case, by the permission which he gave, notwithstanding that he did not know what his interest was, had given to the defendants an irrevocable licence during his own tenure. In my judgment, the answer to that argument is that a licence of that kind, if it is to be irrevocable during the plaintiff's tenure, must have the necessary qualities of a contract, binding on the parties: it must be supported by consideration and must, in other respects, be the subject of a contract. There was, I think, clearly no consideration for the alleged irrevocable licence to pass effluent under the plaintiff's land, and counsel for the defendants has not so contended. He has not contended that the licence which he invokes rests in contract at all: he said that it was a mere gratuitous licence, but that, in the circumstances, it was, during the plaintiff's tenure, irrevocable. In my judgment, that is not well founded.

Counsel for the defendants then fell back on this submission: assuming that it was a gratuitous licence and was revocable, then, by well-established principle, the licensee does not become necessarily a trespasser the moment the licensor says "The licence is at an end"; the alleged trespasser is allowed a reasonable time to remove the cause of the trespass or make other arrangements to discontinue the act which thereby would become a trespass. I read, as part of my judgment on the appeal, the letter of the plaintiff's solicitors dated Aug. 20, 1958. I do not propose to read it again. For present purposes, it is, I think, quite clear that it would constitute a revocation of the licence. It is true that it is not expressed in that way. Nor does it refer to any limit of time at the end of which the effluent must cease to be discharged. But counsel for the plaintiff satisfied me that that is not necessary in determining a revocable licence. I have no doubt that there was time, between Aug. 20 and the proceedings in October, and certainly by the time the hearing came on, for the defendants, if they had been so minded, to make some other arrangement.

It follows, therefore, that, on this narrow point to which this cross-appeal is directed, counsel for the defendants cannot go far enough to show that there was no common law wrong which the learned judge could compensate by an award of 20s. damages. It follows that the cross-appeal, like the appeal, must also fail.

ORMEROD, L.J.: I agree.

WILLMER, L.J.: I also agree that the cross-appeal should be dismissed.

Appeal dismissed. Cross-appeal dismissed.

Solicitors: *W. J. Fraser & Son; J. Tickle & Co.*

F.G.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., DONOVAN AND SALMON, JJ.)

April 20, 1959

R. *v.* GAMMON

Criminal Law—Gross indecency between males—Attempt to procure—Invitation understood by recipient—Need of corroboration.

Although an apparently innocent invitation, albeit accompanied by an intention on the part of the invitor to commit an immoral act, does not amount to an attempt to procure the commission of an act of gross indecency between male persons, such an invitation, accompanied by an invitation making it clear to the recipient what is intended, does amount to such an attempt.

In offences of this nature, corroboration is always to be looked for, whatever the age of the complainant, and it is the duty of the judge to give a clear warning to the jury that they should be careful not to convict in the absence of corroboration unless the evidence completely satisfies them of the guilt of the prisoner.

APPEAL against conviction and sentence.

The appellant was convicted at West Kent Quarter Sessions of attempting to procure acts of gross indecency with seven boys aged fourteen to seventeen and was sentenced to eighteen months' imprisonment. The appellant, who was a baker's roundsman, according to the evidence for the prosecution, stopped a number of boys on different occasions while he was driving his van and invited them into the van, making clear what his purpose was. In no case was the evidence of any boy corroborated. In his summing-up the deputy chairman dealt with the question of corroboration as follows: " I will tell you something which is in his favour in the sense that it is a matter which, in a case of this kind, you will bear in mind. It is the danger, always present where youths of this age group, fourteen to seventeen, are giving evidence of alleged sexual offences against a grown man, that they may be affected, consciously or unconsciously, by the period of life when they are coming to puberty and imagine all sorts of things which never happen and give evidence which sometimes (though they do not realize it) is in fact completely untrue. It applies much more to girls than boys. We who have had long experience of these cases know that the evidence of a girl giving evidence of indecency by a man is notoriously unreliable, and you look in those cases for some other evidence making it more likely that her story is true. It does not apply nearly as much in the case of boys. It applies to some extent.

It does not apply as much where the boys are sixteen and seventeen. Here the youngest boy, I think, is fourteen. Nevertheless, I think it right to give you a general, but vague, warning that you are dealing with the evidence of boys of what I might describe as a sexual age, and there is no independent evidence from some other source that the evidence of any particular boy is true. Having given you that warning, I do not want you to exaggerate it in the least . . ."

Malcolm Morris, Q.C. for the appellant.
Babington for the Crown.

LORD PARKER, C.J.: This appellant was convicted at East Kent Quarter Sessions of attempting to procure acts of gross indecency with seven boys aged fourteen to seventeen, and he was sentenced to eighteen months' imprisonment. He now appeals to this court against his conviction and sentence.

The appellant who was a baker's roundsman of about twenty-two years of age with no previous convictions and married, appears over a period from the end of August to Oct. 23, 1958, to have stopped a number of boys while he was driving his van and, using quite general terms, invited them into his van there to perform acts of gross indecency with him. He was convicted on all seven counts and counsel on his behalf has taken a number of points. I think it is sufficient for the purposes of this appeal to deal with two of them. Counsel says, in the first place, that the evidence of the boys, even if believed, was not such as to constitute the offence of attempting to procure acts of gross indecency. He points to the fact that the deputy chairman in summing-up said this: " Gross indecency is a technical term in our law, but I tell you as a matter of law that if you find in any particular case that this man was accosting a particular boy and inviting him to some act of indecency such as mutual masturbation, you may find that that invitation is evidence of this offence, and that he was attempting to procure him to commit an act of gross indecency with him. Counsel submits that that is wrong and that some act more proximate to the actual physical attempt is necessary in order to constitute the attempt to procure acts of gross indecency. No doubt, every case must depend upon its own facts. It may well be that an invitation to commit an act of gross indecency at some future date before which arrangements are to be made would not constitute an attempt; at any rate, it might be left to the jury whether on those particular facts there was such an attempt. But on the facts of this case where a man stops his van and invites the boy into the van for the clearly expressed purpose of gross indecency, it seems to this court that that invitation clearly constitutes an attempt.

Our attention has been called to a number of cases, first *R.* v. *Cope* (1) where LORD TREVETHIN, C.J., gave the reserved judgment of the court. In that case there had been a written invitation. Although the written invitation did not on its face say that the proposed meeting was for immoral purposes, from the circumstances it must have been obvious to the recipient that that was the sole purpose of the invitation, and the court held that that letter did amount to an attempt. LORD TREVETHIN said: " It is also clear that if it were shown that letters, on the face of them innocent, in fact contained a code known to their addressee by means of which he would receive through the apparently innocent letter a plain invitation to commit such an act the letters would constitute an attempt to procure the commission of the crime." Going the other way was *R.* v. *Woods* (2), where the letter was not in such terms as to convey to the recipient that the object was an immoral object. *R.* v. *Cope* (1) was referred to with approval and it was pointed out by AVORY, J., that in *Cope's* case (1) the letters were

(1) (1921), 86 J.P. 78.
(2) (1930), 22 Cr. App. R. 41.

in such terms "that the intended recipient in that case would, in the circumstances see in the letter an invitation to commit an act of gross indecency with a male person". He goes on: "In the circumstances of the present case no such invitation can be implied from the letters as understood by the recipient." Finally, reference was made to *R.* v. *Miskell* (1), where again it was expressed that the invitation and the acts accompanying it were such as to make it perfectly clear that an immoral purpose was in mind.

In other words, it seems to us that the effect of those cases is that an apparently innocent invitation, albeit accompanied by the intention on the part of the invitor to commit an immoral act, does not amount to an attempt, but such an invitation accompanied by an intention making it clear to the recipient what is intended will amount to an attempt. Here, as I have said, the matter was not left to the jury, but, in the opinion of this court, it is plain that the invitation in the manner I have described could only be an attempt and nothing less than an attempt.

Secondly, counsel complains of the passage in the summing-up dealing with corroboration, or rather with the absence of corroboration. The passage is in these terms:

> "I will tell you something which is in [the appellant's] favour in the sense that it is a matter which, in a case of this kind, you will bear in mind; it is the danger always present where youths of this age group, fourteen to seventeen, are giving evidence of alleged sexual offences against a grown man that they may be affected, consciously or unconsciously, by the period of life when they are coming to puberty and imagine all sorts of things which never happen and give evidence which sometimes (though they do not realize it) is in fact completely untrue. It applies much more to girls than boys. We who have had long experience of these cases know that the evidence of a girl giving evidence of indecency by a man is notoriously unreliable, and you look in those cases for some other evidence making it more likely that her story is true. It does not apply nearly so much in the case of boys. It applies to some extent. It does not apply so much where the boys are sixteen or seventeen. Here the youngest boy, I think, is fourteen. Nevertheless, I think it right to give you a general, but vague, warning that you are dealing with the evidence of boys of what I might describe as a sexual age, and there is no independent evidence from some other source that the evidence of any particular boy is true. Having given you that warning, I do not want you to exaggerate it in the least. I do not want you to take it as expressing my view that it would not be safe to convict or anything of the kind."

Counsel points out what is undoubtedly true—that in offences of this nature corroboration is always looked for, whatever the age of the complainant. It is always the duty of the tribunal in offences of this nature to invite the jury to look for corroboration and to warn them that they should be careful not to convict in the absence of corroboration unless the evidence completely satisfies them of the guilt of the accused. Here, be it observed, there is no reference to the fact that the nature of the offence above requires corroboration, not as a rule of law, but as a practical precaution. The need of corroboration is stated in the summing-up to be based solely on the age group of these complainants and the deputy chairman went on: "It does not apply nearly as much in the case of boys. It applies to some extent." That, as it seems to the court, is watering down, if I may use that expression, the principle still further, and in effect telling

(1) 118 J.P. 113; [1954] 1 All E.R. 137.

the jury that there is very little danger, although it is a matter to which he must refer. There is the further reference to it being " a general, but vague, warning ", and finally in the last passage which I read it is said that it is not a matter which the jury are to exaggerate in the least. This court has said many times that in warning a jury in regard to corroboration in cases of this sort no particular formula is required so long as the sense of the rule of practice is brought home to the jury. Here, the court feels that, so far from giving the ordinary warning that the jury must approach the matter with extreme care and only convict if they are quite satisfied of the prisoner's guilt, it seems that the deputy chairman is minimising the danger involved and telling the jury in effect that it is only a trifling danger which they are being invited to disregard. The court is very loth to interfere in a case of this sort where the evidence, although uncorroborated, was very strong. Nevertheless, a clear direction was called for and all the more so when the boys all knew each other and for one purpose at any rate, namely, the alleged purpose of catching the appellant, had joined together. That being so, the court feels that it would be wrong to allow this conviction to stand in the light of that passage in the summing-up to which I have referred, and, it being a case in which it would be impossible to apply the proviso to s. 4 of the Criminal Appeal Act, 1907, this appeal must be allowed.

Appeal allowed.

Solicitors: *Girling, Wilson and Harvie,* Herne Bay; *Director of Public Prosecutions.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(McNair, J.)

May 27, 1959

GAYNOR *v.* ALLEN

Road Traffic—Negligence—Police motor cyclist travelling at sixty m.p.h. in pursuance of police duties—Speed limit forty m.p.h.—Liability of police motor cyclist —Road Traffic Act, 1934 (24 & 25 *Geo.* 5, *c.* 50), *s.* 3.

The plaintiff, while crossing a highway, was knocked down and injured by a motor cycle driven by A., a police constable, who was killed. The accident occurred twenty minutes after lighting-up time. At the time of the accident, A. was riding at a speed of some sixty m.p.h. in pursuance of police duties. The speed limit was forty m.p.h. Section 3 of the Road Traffic Act, 1934, provides, so far as relevant, that the speed limit on motor vehicles should not apply to any vehicle when used for police purposes.

Held: A.'s civil liability for negligence was not affected by s. 3 of the Road Traffic Act, 1934, and in driving at such speed on a restricted road in the half-light he was guilty of negligence.

Per Curiam: the exempting provision of s. 3 does not qualify police drivers' criminal liability for dangerous driving or, indeed, driving without due care and attention.

Action by the plaintiff, Susan Gaynor, a state registered nurse, claiming from the defendant, Anne Patricia Allen, sued as the administratrix of Edgar Gerald Allen (hereinafter referred to as " the deceased "), damages for personal injuries sustained by the plaintiff and loss and damage suffered by her when she was knocked down by a motor cycle driven by the deceased on Mar. 29, 1958, at the Great West Road, Hammersmith, in the county of London. At the time of the accident the deceased, who was a police constable, was acting in the

course of his police patrol duties and was driving a motor cycle owned by the Receiver of Metropolitan Police. The plaintiff alleged that the accident was due to the deceased's negligence in that he drove at a speed excessive in the circumstances, failed to keep any or any proper look out, failed to brake or to take sufficient steps so as to avoid colliding with the plaintiff, failed properly to steer, manage or control the motor cycle and failed to sound his hooter or flash his headlights. McNAIR, J., found the following facts. It was the plaintiff's custom every day, in going to and from the hospital where she worked, to cross the Great West Road from Eyot Gardens (where she lived) to North Eyot Gardens and vice versa. This involved crossing a double carriageway, the two carriageways consisting of roads some thirty feet wide, divided by a centre division of grass and railings some four or five feet wide. The speed limit on this part of the Great West Road was forty miles per hour. On the day of the accident, the plaintiff, who was returning home after a day's work at the hospital, reached the grass verge on the north side of the Great West Road, immediately opposite the island in the middle of the road, at about 7.20 p.m., which was some twenty minutes after lighting up time; she was intending to cross to the island, and from there, to the south side of the road after having observed if the traffic was clear in both carriageways. The Great West Road was well lit, with lamp standards spaced down the centre division of the road and also along the kerb of each of the carriageways. The plaintiff, who had no clear recollection of the events immediately preceding the accident as a result of concussion caused by the accident, had started to cross the northern carriageway when she was hit by the motor cycle driven by the deceased. The evidence showed that, just before the accident, a group of cars, one of which was travelling faster than the others, had proceeded along the northern carriageway, in the same direction as the deceased and ahead of him. The deceased was travelling at a speed of not less than sixty miles per hour and was probably pursuing, in the course of his police patrol duties, a motor car that was speeding.

The defendant alleged that the plaintiff was guilty of contributory negligence. In the course of the trial the question arose whether s. 3 of the Road Traffic Act, 1934, affected civil liability in respect of a vehicle which was driven in excess of the permitted speed limit while being used for police purposes.

Sherrard for the plaintiff.
P. M. O'Connor for the defendant.

McNAIR, J., having reviewed the evidence and found the facts, continued: The motor cycle was a very powerful machine, capable of a speed of seventy or eighty miles an hour on the Great West Road. Estimates have been given that at the time in question the motor cycle was proceeding at some sixty miles an hour. My conclusion is that the motor cycle was certainly going at that speed, and it may well have been going slightly faster, because it is said that the justification for the speed was that the police motor cyclist (the deceased) was properly engaged in pursuing a motor car that was speeding. The unfortunate rider was killed, but I have had evidence from the police sergeant, who knew him well and had served with him for some years, and he gives him a first-class character, both as a man and as a driver. He said that he had never been involved in any police offence, and that on this evening he was detailed for patrol duty on the road. I think that the fair inference is, and I find, that at the time when he was proceeding at this speed, certainly sixty miles an hour, probably more, he was proceeding at that speed in pursuance of his police duties.

In those circumstances, it is clear by reason of s. 3 of the Road Traffic Act, 1934, that although the road in question was subject to a forty miles an hour limit, the deceased was not guilty of a criminal offence, for s. 3 provides:

> "The provisions of any enactment, or of any statutory rule or order, imposing a speed limit on motor vehicles shall not apply to any vehicle on an occasion when it is being used for fire brigade, ambulance or police purposes, if the observance of those provisions would be likely to hinder the use of the vehicle for the purpose for which it is being used on that occasion."

On the facts here, I am prepared to infer and hold that this motor cycle was being used for police purposes, and was being driven under conditions in which the observance of the forty miles an hour speed limit would have hindered the use of that vehicle for the purpose for which it was being used.

That, however, deals only with criminal liability, and it raises a question which, so far as I know, is without authority, whether and to what extent s. 3 of the Act of 1934, or the circumstances which bring that provision into effect, affects the civil liability of the driver. It is argued on behalf of the defendant that if the deceased had not been driving on official business and had been proceeding at sixty miles an hour or more on that road on that occasion it would have been difficult for him to escape at least partial liability, but those considerations do not apply in the case of the driver in question. On the other hand, it is observed, and rightly observed, that this exempting provision in s. 3 of the Road Traffic Act, 1934, does not in any way qualify the police drivers' criminal liability for dangerous driving or, indeed, for driving without due care and attention. It is submitted that s. 3 must be given a strictly limited application to criminal responsibility and does not affect in any way the driver's civil liability.

In my judgment, the deceased, the driver of this police motor cycle, on this occasion as regards civil liability must be judged in exactly the same way as any other driver of a motor cycle on that occasion. He, like any other driver of a motor vehicle, on that occasion owed a duty to the public to drive with due care and attention and without exposing the members of the public to unnecessary danger.

The question, as I see it, is this: First, is it clear that the deceased, judged by the standard of an ordinary driver of a motor vehicle on his private occasions, is to be held guilty of negligence causing the accident? I think that the answer to that clearly must be "Yes". To drive at that speed on a restricted road, in the half-light, at a time of the evening when it must be known that there may be pedestrians making their way home, is itself, in my judgment, to drive at an improper and unsafe speed.

The second question is whether the plaintiff herself is to be held to any extent, and, if so, to what extent, responsible for the accident. [His Lordship referred to the evidence, which was that the plaintiff walked across the road at a medium pace, looking in front of her, and said that the fair conclusion to draw was that when she stepped off the kerb, having looked to her right to see if the way was clear, as she normally did, she then went straight across the road without again glancing to her right, and that in those circumstances, the plaintiff must bear some responsibility for the accident. His Lordship apportioned the plaintiff's share of the responsibility at one-third and the deceased's share at two-thirds, and went on to assess the general damages, the special damages being agreed at £350 19s. 6d. As a result of the accident the plaintiff suffered a transverse fracture of the mid-shaft of the right tibia and fibula, a fracture of the middle of the right clavicle (collar bone), a fracture of the right scapula (the shoulder blade) and certain abrasions. She was detained in hospital for about six weeks and had her

right leg in plaster for three months. She returned to private nursing some time before Christmas, 1958, and to her full work at Paddington Hospital in April, 1959. She now complained of tiredness in her right leg at the end of a day's work; she had a prominent protrusion at one end of the collar bone, and her right leg was slightly distorted at the site of the fracture. On these facts HIS LORDSHIP assessed the general damages at £750, and awarded the plaintiff two-thirds of that amount.]

Judgment for the plaintiff.

Solicitors: *D. J. Freeman & Fraser; Ponsford & Devenish, Tivendale & Munday.*

G.A.K.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., SLADE AND WINN, JJ.)

June 15, 1959

R. *v.* BISHOP

Criminal Law—Sentence—Supervision order—Discharged prisoner—Failure to register with appointed society—Liability to register address at appointed police station—"Address"—No fixed abode during material night—Liability to give reasonable identification of "place"—Maximum sentence—Prison Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 52), *s.* 29 (1) (*b*), *sched.* 1, *para.* 1 (1), *para.* 2 (1), *para.* 4 (1).

By the Prison Act, 1952, sched. para. 1 (1): "Any person to whom this schedule applies shall—(a) register at an appointed police station in any police area in which he is from time to time residing the address of his residence . . ." By para. 2 (1): "If any person fails without reasonable excuse to comply with any of the requirements of the preceding paragraph, he shall be guilty of an offence and liable on summary conviction thereof to imprisonment for a term not exceeding six months . . ." By para. 4 (1): ". . . a person shall be deemed to reside at any place of whatever description at which he spends a night."

The appellant, to whom sched. 1 applied, arrived in Portsmouth on Feb. 18, 1959, and was arrested on Feb. 20 and charged with having failed to register his address at a police station. He elected to be tried by a jury and was convicted. He stated that at the material time he had no fixed abode and spent the days wandering about Portsmouth and sleeping in bus shelters.

HELD: (i) that the conviction was right, as "address" in sched. 1 to Act of 1952 was not limited to a postal address and it was possible for the appellant to comply with the obligation to register his address at the police station by giving a reasonable identification of the places where he had spent the night; (ii) that no defence was afforded to the appellant by the fact that the appointed society had not informed the appellant that they had given the statutory notice to the Commissioner of Police for the Metropolis, as the appellant had not on his discharge notified any address to the society and the society could not, accordingly, have taken any steps to inform the appellant.

The maximum term of imprisonment for an offence against para. 2 (1) of sched. 1 is six months, whether the offence is dealt with summarily or on indictment or the election of the accused person.

APPEAL against sentence.

The appellant, Edwin Francis Bishop, was charged, at Portsmouth City Quarter Sessions, with failing to comply with the requirements of sched. 1 to the Prison Act, 1952, in that, being a person to whom the schedule applied, he had resided between Feb. 18 and Feb. 20, 1959, at Portsmouth and had failed to

register his address at the appointed police station pursuant to para. 1 (1) of the schedule. The defence was that he had no fixed abode and was wandering about Portsmouth all the time and was, therefore unable to register any address. He was convicted of the offence and was sentenced to nine months' imprisonment. He appealed against both the conviction and the sentence.

By s. 22 (1) of the Criminal Justice Act, 1948, as amended by s. 54 (1) of and sched. 3 to the Prison Act, 1952:

> " Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(a) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment; or (b) has been previously convicted of an offence for which he was sentenced to corrective training, the court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of s. 29 of the Prison Act, 1952."

By s. 29 (1) of the Act of 1952:

> " Where an order has been made under s. 22 of the Criminal Justice Act, 1948 (which, as amended by this Act, requires a court in certain circumstances to order that a person shall for a period of twelve months be subject to the provisions of this section)—(a) the offender shall, on his next discharge from prison and thereafter from time to time, inform the appointed society of his address in accordance with such instructions as may be given to him by or on behalf of the society; (b) if the offender fails to comply to the satisfaction of the appointed society with the aforesaid requirement to notify his address on his discharge, the society shall, and if he subsequently fails to keep the society informed of his address to their satisfaction the society may, give notice by registered post of the failure to the Commissioner of Police of the Metropolis, and shall use their best endeavours to inform the offender that the notice has been given; and as from the date on which any such notice has been given as aforesaid, the provisions of sched. 1 to this Act shall apply to the offender."

Brock for the appellant.
J. B. S. Edwards for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant was sentenced on Sept. 23, 1957, to eighteen months' imprisonment and an order was made under s. 22 of the Criminal Justice Act, 1948. On Oct. 25, 1958, he was released after serving that sentence, and he failed to register with the appointed society. As a result, the appointed society notified the Commissioner of Police of the Metropolis, and in February, 1959, he was found at Southsea by the police and was charged with having failed to register his address pursuant to Sch. 1 to the Prison Act, 1952. In due course he elected to go for trial before Portsmouth City Sessions, where he was convicted and sentenced by the learned recorder to nine months' imprisonment. He now appeals to this court by leave of the court both against his conviction and his sentence.

The case raises an interesting question which, as far as the court knows, has never arisen before, on the true interpretation of the Prison Act, 1952, and, in particular, of sched. 1 to the Act. [His lordship read s. 29 (1).] It is provided by para. 3 (3) of sched. 1 to the Act:

> " A certificate purporting to be signed by or on behalf of the Commissioner of Police of the Metropolis and certifying that he has received a notice given pursuant to s. 29 (1) (b) of this Act to the effect that a person has failed to comply with any requirement under that subsection shall, in any such proceedings as aforesaid, be evidence of the notice having been duly given and of the contents of the notice."

In the present case there was such a certificate, and, accordingly, there was evidence, which was uncontroverted, that the appointed society had notified the Commissioner of Police of the Metropolis of a failure by the appellant to inform the society of his address, and there was also evidence of the contents of the notice, namely, that the appellant had failed to notify his address to the society. Therefore, there is no doubt that he thereupon became subject to Sch. 1 to the Act of 1952.

Paragraph 1 of sched. 1 provides:

> " (1) Any person to whom this schedule applies shall—(a) register at an appointed police station in any police area in which he is from time to time residing the address of his residence; (b) report once in each month, on such day as may be directed by or on behalf of the chief officer of police, at the police station at which his address for the time being is registered.
>
> " (2) Where any person to whom this schedule applies changes his residence, he shall, on registering his new address under this paragraph, state the address which was last registered by him thereunder."

Then by para. 2 (1) it is provided:

> " If any person fails without reasonable excuse to comply with any of the requirements of the preceding paragraph, he shall be guilty of an offence and liable on summary conviction thereof to imprisonment for a term not exceeding six months: Provided that: (a) in proceedings for a failure to register an address it shall be a defence for the defendant to prove either that—(i) being on a journey to a particular destination he remained no longer in the place in which he failed to register his address than was reasonably necessary for the purposes of that journey; or (ii) his absence from his registered address was temporary and that he kept the officer in charge of the police station at which that address was registered sufficiently informed of his whereabouts . . ."

The other provisions of para. 2 do not, I think, matter. Finally, by para. 4 (1) it is provided:

> " For the purposes of this schedule, a person shall be deemed to reside at any house or other place of whatever description at which he spends a night."

The appellant arrived in Portsmouth on Feb. 18. He was arrested on Feb. 20, and the indictment alleged:

> " That between Feb. 18 and 20, 1959, at Portsmouth, you, being a person to whom the schedule applied, resided within the police area of Southsea Police Station, being the appointed police station for the said area, and that you unlawfully failed without reasonable excuse to register the address of your residence at the police station."

At first the appellant said that he had spent the two nights at the reception centre. When he came to give evidence, he denied that and said that he had no fixed abode and that he was wandering about Portsmouth all the time. The

learned recorder told the jury that it mattered not whether the appellant had an address in the ordinary sense of the word, and that it was enough if he had come to Portsmouth other than merely for the purpose of passing through it to get to another destination; in other words, that he had come there to stay, albeit he spent part of the time in a bus shelter or whatever it might be. It is sufficient to refer to a passage in the summing-up, where the recorder said this:

> "The first issue of fact for you is: Did [the appellant] in fact stay at the reception centre? He said he did, but now he says that is untrue, that he did not, that he had no place of residence. I have pointed out to you that he became under an obligation to report as soon as he arrived, with an intention to stay, even if he had not acquired a place of residence. Any place where he spent a night is a place within the meaning of the Act, even if it is only a bus shelter; and it is no answer to say 'I did not have a house to sleep in, I did not have lodgings'."

The first ground of appeal against conviction is based on that passage in the summing-up. It is said, and said with some force, that one cannot register the address of a residence if the place where one has resided is a place such as a bench on the promenade or a bus shelter, which is not an "address" in the ordinary sense of the word. It is true, so the argument runs, that para. 4 (1) of sched. 1 provides that

> "... a person shall be deemed to reside at any house or other place of whatever description at which he spends a night."

Despite those words, so it is said, what is there deemed to be a residence or a residing must be cut down to such house or other place of whatever description which can be said to have an "address" in the ordinary sense of the word.

This is a novel point, and not without difficulty, but the court has come to the conclusion that that argument is wrong. It is to be observed, in the first place, that, on the prisoner's discharge from prison there is a duty on him, under s. 29 (1) (a), to inform the appointed society of his address. It would be a very curious result if a person could avoid his obligations under the statute by sleeping rough and saying, in effect, "I have no address". Similarly, in the case of a man who had failed to inform the appointed society of his address and had been reported to the police, it would be even more curious if he were able to say: "I do not have to report at the police station; I do not have to register anything at the police station because I have no address at all in the ordinary sense of the word". Clearly the whole object of the Act would be defeated if such an argument were to prevail, but, quite apart from that, the court feels that, as a matter of construction, there is no reason to give that effect to the statute. The residence which calls for registration and a monthly report is something which is described by the words "shall be deemed to reside": "a person shall be deemed to reside", that is, to have his residence, "at any house or other place of whatever description at which he spends a night". Observe, therefore, that even one night in such a place brings on him the obligation to register and that the residence can be any place "of whatever description". Wider words could not be imagined, and the whole question is whether there is any justification for cutting down those very wide words by reading into para. 4 (1) of sched. 1 to the Act of 1952 words to the effect "provided always that such place has an address". It seems to this court that "address", both in s. 29 of the Act of 1952 and in sched. 1, is not referring to an address in the ordinary sense of the word as a postal address. It denotes something less than that, and the court thinks that the obligation which arises on a deeming to reside in any "place of whatever description at which he spends a night" can be fulfilled, and should properly be fulfilled,

by giving a reasonable identification of such a place, not necessarily a postal address but something which describes or identifies the place with reasonable certainty. Accordingly, the court feels in the present case that the direction by the learned recorder is unobjectionable. The appellant clearly did "spend a night" in Portsmouth—it is to be observed that para. 4 (1) does not say "sleeps for a night". He spent the night in a place of some description in Portsmouth, and, therefore, it became his obligation to register, at the appointed police station, a reasonable identification of that place.

The second ground of appeal concerns the phrase in para. 2 (1) of sched. 1:

> "If any person fails without reasonable excuse to comply with any of the requirements of the preceding paragraph . . ."

Here a number of points have been taken by counsel for the appellant, but it is sufficient, the court thinks, to deal with only one of them, namely, that the appellant had not been informed and was ignorant of his obligation. It had not been proved by the prosecution, so it is said, first, that the governor of the prison had given him information as to his liability under the order, and, secondly, that the appointed society had used their best endeavours to inform the appellant that they had given notice to the Commissioner of Police. As to the duty of the governor, it is provided by s. 29 (2) of the Act:

> "It shall be the duty of the governor of a prison on the discharge from prison of an offender against whom an order has been made under the said s. 22 to serve upon him a notice stating the effect of the order."

It seems clear on that provision that it is the duty of the governor to serve on a prisoner in such circumstances a notice which not merely says that it is his duty to inform the appointed society of his address, but which also explains to him what will happen to him if he fails to give that information and, in particular, that he will then become subject to sched. 1. The court finds it unnecessary in this case to consider exactly where the onus of proof lies, although it certainly looks as if it would be for the prisoner in the first instance to put forward what he considered to be some reasonable excuse, although it might well be that at the end of the day the question would arise whether the prosecution had proved that he failed without reasonable excuse to comply with the requirement. So far as the present case is concerned, it seems perfectly clear that the governor gave a notice to the appellant, for the appellant himself admits that when he was discharged from Preston Prison on Oct. 25, 1958, he was told to report to the After-Care Association. So far as concerns the failure of the appointed society to use their best endeavours to inform the appellant that the notice had been given, it is really difficult in a case such as this to see how the society can do anything in the matter, having taken the steps which they have taken, namely, notifying the Commissioner of Police, for the very reason that the man who was a prisoner has not given an address. Therefore, there can in the present case, so it seems to the court, be no question of the appellant being able to say: "I was acting under a reasonable excuse in that I did not appreciate that I was going to make myself liable to sched. 1". So much for the appeal against conviction.

As regards the appeal against sentence, the learned recorder sentenced the appellant to nine months' imprisonment, whereas para. 2 (1) of sched. 1 provides that a person guilty of this offence shall be

> ". . . liable on summary conviction thereof to imprisonment for a term not exceeding six months."

What happened in this case was this. Under para. 2 (1), the offence is triable summarily, but as the maximum sentence is in excess of three months, the appellant was entitled to elect, and elected, to be tried at sessions. It was submitted by the prosecution that, in effect, para. 2 (1) of sched. 1 was merely saying that, if the trial was a summary trial, the maximum sentence was a term of six months, whereas, if the offender elected to be tried at sessions, the punishment was entirely at large. The court cannot accede to that argument. It seems plain that the provision in para. 2 (1) of sched. 1 that an offender is liable on summary conviction to imprisonment for a term not exceeding six months means that he is so liable on conviction in proceedings initiated in a court of summary jurisdiction. Accordingly, the court feels that in the present case the maximum sentence was a term of six months. Lastly, it was urged by counsel for the appellant that in all the circumstances of the case six months would be excessive and that there ought to be some further reduction. The court sees no reason to give a sentence in the present case of less than six months' imprisonment, and, therefore, while the sentence of nine months' imprisonment cannot stand, the court will substitute a sentence of six months. Accordingly, the appeal against conviction is dismissed; the appeal against sentence is allowed and six months is substituted for nine months.

Appeal against conviction dismissed; appeal against sentence allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Town Clerk*, Portsmouth.

T.R.F.B.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., CASSELS AND WINN, JJ.)

May 26, 1959

R. *v.* DANGERFIELD

Magistrates—Quarter sessions—Committal with view to Borstal sentence—Road traffic offences—Disqualification imposed in addition to Borstal sentence—Limitation of powers of quarter sessions—Advisability of committal under s. 29 rather than under s. 28 of Magistrates' Courts Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 55).

The appellant, who was seventeen years of age, was convicted by a magistrates' court on three charges of taking and driving away a vehicle without lawful authority and on two charges of driving while uninsured, and he was committed to quarter sessions for sentence under s. 28 of the Magistrates' Courts Act, 1952, with a view to a sentence of Borstal training being passed. Quarter sessions imposed concurrent sentences of Borstal training and disqualification for holding or obtaining a driving licence for five years. On appeal by the appellant against sentence,

HELD: under s. 20 (5) (a) of the Criminal Justice Act, 1948, the powers of quarter sessions were alternative and were limited either to imposing a sentence of Borstal training or to dealing with the offender in any manner in which the court of summary jurisdiction could have dealt with him; the sentences imposed on each charge were, therefore, invalid as being in excess of jurisdiction, but the Court of Criminal Appeal could vary the sentence by imposing in respect of the first four charges concurrent sentences of Borstal training and on the fifth charge a sentence of disqualification for five years, being a sentence which the magistrates' court could lawfully have imposed.

Per CURIAM: In a case to which s. 29 of the Magistrates' Courts Act applies, it is preferable to commit an offender for sentence to quarter sessions under s. 29 rather than under s. 28, as the powers of quarter sessions on committal under s. 29 are not so limited as they are under s. 28.

APPEAL against sentence.

The appellant, Terence Edwin Dangerfield, was convicted at Acton Magistrates' Court on Dec. 31, 1958, on two charges of taking and driving away a motor vehicle without the consent of the owner or other lawful authority, contrary to s. 28 of the Road Traffic Act, 1930, and on three charges of using a motor vehicle on a road without there being in force in relation to the user thereof a policy of insurance or such other security as complied with Part 2 of the Act of 1930, contrary to s. 35 of the Act. The magistrates' court committed him to Middlesex Quarter Sessions, under s. 28 of the Magistrates' Courts Act, 1952, for sentence in accordance with s. 20 of the Criminal Justice Act, 1948, and the chairman of quarter sessions sentenced him to Borstal training and disqualified him for holding or obtaining a driving licence for five years, concurrently, on each charge. The appellant appealed against the sentence, the main ground of appeal being that, under s. 20 (5) (a) of the Act of 1948, quarter sessions had no jurisdiction to impose a sentence of disqualification in addition to a sentence of Borstal training.

By s. 20 (5) of the Criminal Justice Act, 1948:

> "Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say:—(a) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case and may—(i) if satisfied of the matters mentioned in sub-s. (1) of this section, sentence him to Borstal training; or (ii) in any case, deal with him in any manner in which the court of summary jurisdiction might have dealt with him . . ."

M. D. L. Worsley for the appellant.

The Crown was not represented.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant was convicted at Acton Magistrates' Court of taking and driving away a motor cycle without authority or insurance. He was committed to Middlesex Quarter Sessions under s. 28 of the Magistrates' Courts Act, 1952, and was then sentenced by the chairman under s. 20 of the Criminal Justice Act, 1948, to Borstal training and disqualified for five years for holding or obtaining a driving licence. Two points are taken by counsel for the appellant on an appeal against that sentence, first, a point of law, which I will discuss subsequently, that the sentence was in a form which is not permissible and, secondly, that in any case Borstal training and disqualification for five years is too severe a sentence. The court sees no reason to interfere with the sentence of Borstal training as a matter of principle. The appellant is a young man seventeen years of age. He has been on probation for larceny. He has been to an approved school for two larcenies in dwelling-houses, fined for obstructing the police, fined for common assault and fined in August, 1958, for obstructing the police. It appears that he is a man of very hot temper, and he must learn to control it. The chairman thought, and, indeed, the magistrates must have thought because they committed him under s. 28 of the Act of 1952, that Borstal training was the appropriate sentence for him. The court, having considered the matter, sees no reason to interfere.

The point of law that arises is this. It is, so the court thinks, clear that, when magistrates have committed an offender to quarter sessions under s. 28 of the Magistrates' Courts Act, 1952, the powers of quarter sessions under s. 20 (5) (a) of the Act of 1948 are limited to sentencing the offender to Borstal training or—and it is an alternative—to dealing with him in any manner in which the court of summary jurisdiction might have dealt with him. Accordingly, it is said that

quarter sessions cannot at one and the same time sentence an offender to Borstal training and disqualify him. That is perfectly clear; but in the present case there were no less than five charges, and although, in form, the sentence of the learned chairman is wrong because he, in effect, passed the sentence of Borstal training and disqualification in respect of each charge concurrently, yet it was within his power, and, therefore, within the power of this court, to provide that on four of the charges there should be, in each case, a sentence of Borstal training, the terms to be concurrent, and that on the fifth charge the sentence should be one which the magistrates could have imposed, namely, disqualification. Accordingly, this court will vary the sentence to one of Borstal training on four of the charges, the terms to run concurrently, and five years' disqualification on the other charge.

I should like to mention one further matter which is often overlooked. In the case of an offender who is seventeen years old, as the appellant was, it is often possible for magistrates to commit the offender to quarter sessions for sentence under s. 29 of the Act of 1952. That is a general committal, and not merely a committal for a sentence of Borstal training, and then, under s. 29 (3) (a) of the Criminal Justice Act, 1948, quarter sessions will have complete power to deal with the matter and are not limited in the way in which they are limited when their powers are derived from s. 20 of the Act of 1948. Accordingly, as this court has said before, magistrates should remember that, in the case of an offender of seventeen years of age, or over that age, it is simpler to commit him in a proper case under s. 29, rather than s. 28, of the Magistrates' Courts Act, 1952.

Appeal dismissed.

Solicitor: *Registrar, Court of Criminal Appeal.*

T.R.F.R.

QUEEN'S BENCH DIVISION

(SALMON, J.)

June 1, 2, 22, 1959

WATERSON AND OTHERS *v.* HENDON BOROUGH COUNCIL

Rates—Limitation of rates chargeable—Full amount of rates without claiming relief paid in first year of new valuation list—Right of ratepayer to claim relief in subsequent years—Rating and Valuation (Miscellaneous Provisions) Act, 1955, (4 & 5 *Eliz.* 2, *c.* 9), *s.* 8 (2).

A society registered under the Friendly Societies Acts occupied hereditaments which included a hospital, equipped to treat nearly every type of surgical and medical case, a nurses' home, and an optical clinic. The objects of the society, as set out in its rules, were to provide, by members' voluntary contributions, for " the relief of members in sickness or infirmity ". These objects were carried out by providing at the society's hospital and other medical units free orthopaedic, surgical, medical, dental and optical treatment. The rules provided that membership of the society was to be unlimited in numbers and that every member should have an equal voice in the concerns of the society. Membership was open to all who were engaged in industry or commerce (industrial members) including their wives and children over fifteen, and also to founder members (subscribers of not less than one hundred guineas), life members (subscribers of not less than twenty-five guineas) and annual members (annual subscribers of not less than one guinea). Industrial members were required to pay a minimum contribution of 3d. a week except those who had contributed for not less than ten years and at sixty-five, on retiring from work, were unemployed, who paid 1d. a week. Anyone twenty-six weeks in arrears with

contributions ceased to be a member. The society had a membership of 400,000 all of whom, except about 2,000, were industrial members. Patients at the hospital were all members of the society apart from a few persons accepted as emergency cases. The society was not established or conducted for profit. In August, 1956, the plaintiffs, the trustees of the society, applied for relief from rates charged on the society for the year ending Mar. 31, 1957, under the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8. The rating authority refused to grant relief, and the plaintiffs appealed to quarter sessions, but their notice of appeal was out of time and they withdrew it. Subsequently, the plaintiffs paid the full amount of rates for the year ending in March, 1957. They now sought a declaration that the society was an organisation within s. 8 (1) (a) of the Act of 1955, viz., an organisation " whose main objects are charitable or are otherwise concerned with the advancement of . . . social welfare ", and, therefore, entitled to relief from rates under s. 8 (2). The rating authority contended that the court had no jurisdiction to grant the declaration.

HELD: (i) the court had jurisdiction to grant the declaration, which, if granted, would be effective to entitle the society to obtain relief for the years following that ending in March, 1957, since, on the true construction of s. 8 (2) of the Act of 1955, " the amount of rates chargeable for the first year " meant the amount of rates for which the ratepayer would have been liable after any relief to which he was entitled, and the fact that there had been an overpayment in the first year was irrelevant in considering the ratepayer's right to relief in the following years.

(ii) the society was not an organisation within s. 8 (1) of the Act of 1955, because its main object was to do good to itself, that is, to the members of the society themselves, and such a purpose was not charitable, since it lacked the element of public benefit (dictum of LORD SIMONDS in *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. at p. 34, applied), nor was it " otherwise concerned with the advancement of . . . social welfare ", since it lacked the requisite element of altruism (*National Deposit Friendly Society (Trustees)* v. *Skegness U.D.C.*, (1958), 122 J.P. 399, and *Independent Order of Odd Fellows Manchester Unity Friendly Society* v. *Manchester Corpn.*, (1958), 122 J.P. 1, followed; dictum of VISCOUNT SIMONDS in *Skegness U.D.C.* v. *Derbyshire Miners' Welfare Committee*, (1959), 123 J.P. 338, considered).

ACTION by the plaintiffs, Alfred Edward Waterson, John Albert Flaxman and William James Henry Bray Rodwell, as trustees of the Industrial Orthopaedic Society (hereafter referred to as " the society "), claiming against the defendants, Hendon Borough Council, a declaration that the society was an organisation within the meaning of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), and, accordingly, entitled to relief from rates under s. 8 (2). The society was an unincorporated society, registered under the Friendly Societies Acts, 1896 to 1948, and, by its rules, the plaintiffs were authorised to sue on behalf of the society. The society owned and occupied certain hereditaments in Golders Green, London, N.W.11, the most important being the Manor House Hospital in North End Road (where the society had its registered office), including an out-patients' department and consulting rooms in North End Road, a nurses' home and an optical clinic. The hospital was large, well equipped and fully staffed for treating almost every type of surgical or medical case. In August, 1956, the plaintiffs applied to the defendants, who were the rating authority, for relief from rates under s. 8 of the Act of 1955, in respect of the rates charged on them for the year ending Mar. 31, 1957. On Mar. 28, 1957, the defendants notified the plaintiffs that they refused to grant this relief, and on Oct. 25, 1957, the plaintiffs gave notice of appeal from this refusal to Middlesex Quarter Sessions. The notice of appeal was out of time and invalid, and the plaintiffs subsequently withdrew it and paid the full amount of rates with which they had been charged without any deduction. The objects of the society were set out in its rules which provided as follows:

" 1 (1) The society is a friendly society. It shall be called the Industrial Orthopaedic Society. (2) The society shall consist of an unlimited number

of members and every member shall have an equal voice in all the property and concerns thereof except as otherwise provided in these rules or by law.

"3 (1) The objects of the society shall be to provide by the voluntary contributions of the members for the relief of members in sickness or infirmity. (2) Such objects shall be carried into effect by the provision of orthopaedic treatment and such surgical and medical treatment at the [Manor House] hospital's rehabilitation or other medical units of the society as the executive committee may from time to time determine. (3) The provision of dental and optical benefits at the Manor House hospital or its clinics for members.

"4 (1) Membership of the society shall be open to the following classes of persons:—(a) Founder members who shall subscribe a sum of not less than one hundred guineas. (b) Life members who shall subscribe in one sum twenty-five guineas. (c) Annual members who shall make an annual subscription of not less than one guinea. (d) Industrial members. (2) Any person desiring to become a founder or a life or annual member may on application to the executive committee be accepted by them into membership of the society and shall thereupon be entitled to such benefits as are provided by these rules. (3) Industrial membership shall be open to all engaged in industry or commerce. The wives and children (over the age of fifteen) of industrial members shall also be eligible for industrial membership.

"5 (1) Every member of the society, other than founder, life or annual members, shall pay a minimum contribution of threepence per week except members who have contributed for not less than ten years and who on retirement at sixty-five are not gainfully employed shall pay one penny per week.

"6 (1) Any member twenty-six weeks in arrears with contributions shall cease to be a member of the society. Group members shall retain their membership and right to benefit whilst their contributions are being paid but shall cease to be members directly their contributions are discontinued by the group, unless application be made to the appropriate area organiser, district secretary or local secretary for transfer of membership within a period of thirteen weeks.

"8 (1) The executive committee may accept donations from persons in sympathy with the objects of the society or desirous of furthering such objects. Such donations in the absence of any expressed desire by the donor that the gift shall be applied to any particular purpose shall be placed to the credit of the general funds.

"11 (1) Should any member require treatment as laid down in these rules and have been in the society for six months and be not more than thirteen weeks in arrears . . . the organiser of the area . . . shall be informed . . . of the circumstances . . . If in order the member will be sent for examination to the society's medical referee. The area organiser shall thereafter . . . arrange for such treatment as the referee prescribes provided such treatment is within the society's scope and he shall be entitled to free treatment and maintenance . . ."

At the time of this action there were 400,000 members of the society all of whom, except about 2,000, were industrial members. The patients at the Manor House hospital, apart from a few who were accepted as emergency cases, were all members of the society. The society was not established or conducted for profit.

The defendants contended that the court had no jurisdiction to grant the declaration claimed by the plaintiffs, and, further, that the objects of the society were not charitable or otherwise concerned with social welfare within the meaning of s. 8 (1) of the Act of 1955.

Arnold, Q.C., and *G. V. Owen* for the plaintiffs.
Molony, Q.C., and *Miss Monique S. Viner* for the defendants.

Cur. adv. vult.

June 22. **SALMON, J.,** read the following judgment. The first point taken by the defendants is that the court has no jurisdiction to hear the present action. Counsel for the defendants argued that, even if the plaintiffs are right in their contention that they would have been entitled to relief in respect of the rates for the year ending Mar. 31, 1957, nevertheless no declaration should be granted since it would be wholly ineffective. He contends (i) that, if the plaintiffs paid more than they need have done in respect of the year ending Mar. 31, 1957, such overpayment was made under a mistake of law and is irrecoverable: (ii) that, on the true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, a ratepayer who pays the full rate in the first year without claiming relief loses his right to relief for all subsequent years: and (iii) that the payment of the full rate and the withdrawal of the notice of appeal to quarter sessions operate as a species of res judicata or estoppel. In my judgment, counsel for the defendants' first point is clearly a sound one and has not been seriously contested; the declaration could not operate to enable the plaintiffs to recover any amount that they may have overpaid. Counsel did not press his third point and it seems to me clearly to be unarguable. As to the second point, I cannot find anything in the language of s. 8 (2) of the Act of 1955 or in the language of para. 3 of sched. 5 to the Act to support the contention put forward on the part of the defendants. Subsection (2) reads as follows:

> " For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as ' the first year of the new list '), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows, that is to say—(a) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force; (b) if, by virtue of the preceding paragraph, the amount of rates chargeable in respect of the hereditament is less than it would have been apart from that paragraph, the proportion by which it is thereby required to be reduced shall apply to any subsequent year during which the hereditament continues to be one to which this section applies, and accordingly the amount of rates chargeable in respect of the hereditament for any such year shall be reduced by that proportion: Provided that this subsection shall have effect subject to the provisions of sched. 5 to this Act in cases falling within that schedule."

Paragraph 3 of sched. 5 deals with the position where structural alterations are made to the hereditament during the first year of the new list, but its language so far as it is relevant to counsel for the defendants' point is substantially the same as the language of s. 8 (2).

In my judgment, " the amount of rates chargeable for the first year " means the amount of rates for which the ratepayer would have been liable after any

relief to which he was entitled. This means that the amount of rates chargeable for the following year is calculated under the Act not in relation to the amount which he paid in the first year but in relation to the amount of rates less relief for which the ratepayer would have been liable in the first year. Accordingly, in my judgment, the fact that he may have made an overpayment in the first year is quite irrelevant in considering his rights to relief in the following years.

It has also been faintly suggested that a ratepayer can in any event claim relief only by way of appeal to quarter sessions or by contesting the rating authority's application for a distress warrant which would follow a refusal to pay. There does not seem to me to be anything in this suggestion. I can see no reason why proceedings in this Division or in the Chancery Division should not be instituted for a declaration. Indeed, *Berry* v. *St. Marylebone Corpn.* (1), and *General Nursing Council for England and Wales* v. *St. Marylebone Corpn.* (2) are examples of actions for a declaration in similar circumstances. It was not suggested in either case that the action was not maintainable. I, therefore, come to the conclusion that the court has jurisdiction to entertain this action, and that, if the society is an organisation within the meaning of s. 8 (1) of the Act of 1955, a declaration to that effect would entitle it to obtain relief for the years following the year ending Mar. 31, 1956.

The real question in this case turns on whether the hereditaments in question are occupied for the purpose of an organisation which is not established or conducted for profit and whose main objects are charitable or otherwise concerned with the advancement of social welfare within the meaning of s. 8 (1) (a) of the Act of 1955. It is conceded that the society is an organisation which is not established or conducted for profit. Counsel for the plaintiffs contends first that the main object of the society is charitable. It is now generally accepted that, for the object of an organisation to be charitable, the object must confer a public benefit except only where the object is to relieve poverty. Here the object is the relief of sickness and infirmity. Although counsel for the plaintiffs has kept the point open, he virtually concedes that this court cannot depart from the generally accepted view. He argues, however, that the object of the society confers a public benefit. In considering a similar point in *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* (3), LORD SIMONDS said:

> "The difficulty arises where [the object] is . . . for the benefit of a class of persons at large. Then the question is whether that class of persons can be regarded as such a 'section of the community' as to satisfy the test of public benefit. These words 'section of the community' . . . indicate (i) that the . . . beneficiaries must not be numerically negligible, and (ii) that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual . . . A group of persons may be numerous, but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes."

In the present case, the beneficiaries are certainly not numerically negligible. There is, however, in my judgment the closest nexus between the beneficiaries and the society since de minimis they are all members of it. This is apparent from the evidence and the rules to which I will presently refer. Moreover, the

(1) 122 J.P. 59; [1957] 3 All E.R. 677; [1958] Ch. 406.
(2) 123 J.P. 169; [1959] 1 All E.R. 325.
(3) [1951] 1 All E.R. 31; [1951] A.C. 297.

object of the members of the society is not to do good to others but to themselves. This object is not altruistic and is, in my judgment, not charitable.

Counsel for the plaintiffs contends secondly that the main object of the society, if not charitable, is at any rate " otherwise concerned with the advancement of . . . social welfare ". This raises a familiar and usually perplexing problem. The society is an unincorporated society registered under the Friendly Societies Acts, 1896 to 1948. [HIS LORDSHIP referred to the relevant rules of the society, and continued:] There are today about 400,000 members of the society, all of whom except about 2,000 are industrial members. The Manor House Hospital is a large well-equipped hospital fully staffed for treating almost every type of surgical or medical case. The patients at the hospital are all members of the society, except only a very few accepted as emergency cases. The main object of the society as the rules make plain is to afford its members (who are the society) free medical services and maintenance at the Manor House Hospital in return for their subscriptions. This object seems to me to be concerned primarily with self-help and the private interests of the society's own subscribing members rather than social welfare. I have no doubt that the hospital itself makes a notable contribution to social welfare. In my judgment the main object of the society, however laudable, is not social welfare notwithstanding that social welfare is a by-product of its activities. Although there are differences on the facts, this case, in my judgment, is indistinguishable in principle from *National Deposit Friendly Society (Trustees)* v. *Skegness U.D.C.* (1). No precise definition has ever been attempted of the words " otherwise concerned with the advancement of social welfare" nor, perhaps, is any such definition possible. I shall certainly attempt none. The cases, however, seem to support the view that the main object of the organisation in question must be characterised by altruism inasmuch as the words in the statute connote doing good for others rather than for oneself: see, for example, *National Deposit Friendly Society (Trustees)* v. *Skegness U.D.C.* (1) and *Independent Order of Odd Fellows Manchester Unity Friendly Society* v. *Manchester Corpn.* (2). Counsel for the plaintiffs contends that, although this may have been the correct view before the decision of the House of Lords in *Skegness U.D.C.* v. *Derbyshire Miners' Welfare Committee* (3), that view can no longer prevail. He relies on a passage in the speech of VISCOUNT SIMONDS with which LORD MORTON OF HENRYTON, LORD REID and LORD KEITH OF AVONHOLM agreed and from which LORD DENNING did not dissent. This passage reads as follows:

> " They urge that a trust or institution cannot be regarded as charitable if it is not created by the benevolence of a donor or donors, and that that element is absent in the present case. Next, they say, that, just as benevolence or altruism is a necessary element in legal charity, so an object of an organisation cannot be regarded as ' otherwise concerned with the advancement of social welfare ' unless it, too, has such an element. I accept neither of these propositions. The crucial test is the purpose to which money is devoted, not the source from which it is derived."

It may be that VISCOUNT SIMONDS meant no more than that it is unnecessary for the donors of the funds which support the organisation to be actuated by benevolence so long as the main object of the organisation and the purpose for which the money is devoted has an altruistic character. If that is so, the fact on which counsel for the plaintiffs relies strongly, namely that this society is

(1) 122 J.P. 399; [1958] 2 All E.R. 601.
(2) 122 J.P. 1; [1958] 3 All E.R. 378.
(3) ante p 338.

partly supported by donations from benevolent outside sources, is irrelevant. In *Skegness U.D.C.* v. *Derbyshire Miners' Welfare Committee* (1), a holiday centre was provided and maintained by a statutory levy and by contributions from the National Coal Board and those who made use of the holiday centre. Accordingly, the money did not come from donors actuated by benevolence. The precise composition of the organisation which occupied the holiday centre was never ascertained. It was, however, clear that whatever the organisation's composition might be, its object was not to benefit itself but to benefit Derbyshire miners generally. Accordingly, the object of the organisation may be said to have been characterised by altruism and the money used for a benevolent purpose. If the House of Lords in *Skegness U.D.C.* v. *Derbyshire Miners' Welfare Committee* (1) intended to disapprove or question the dicta or indeed the ratio decidendi of the opinions of LORD MACDERMOTT and LORD DENNING in *National Deposit Friendly Society (Trustees)* v. *Skegness U.D.C.* (2), it is, perhaps, strange that it did not expressly do so. However this may be, I find it impossible on the facts of this case to hold that the main object of this society is concerned with the advancement of social welfare. The main object of the members of the society, who are the society, is to benefit themselves. There will, accordingly, be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Pattinson & Brewer*; *R. H. Williams.*

G.A.K.

(1) ante p. 338.
(2) 122 J.P. 399; [1958] 2 All E.R. 601.

HOUSE OF LORDS

(VISCOUNT SIMONDS, LORD GODDARD, LORD OAKSEY, LORD KEITH OF AVONHOLM AND LORD JENKINS)

May 26, 27, 28, June 1, July 6, 1959

PYX GRANITE CO., LTD. *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT AND OTHERS

Town and Country Planning—Development—Permission—Necessity for permission—Agreement between quarry owners and local authority as to quarrying areas scheduled to Act of Parliament—Development "authorised by local or private Act"—Town and Country Planning General Development Order, 1950 (*S.I.* 1950 *No.* 728), *art.* 3 (1), *sched.* 1, *class* xii—*Malvern Hills Act*, 1924 (14 & 15 *Geo.* 5 *c.* xxxvi), *s.* 54, *sched.* 4.—*Town and Country Planning Act*, 1947 (10 & 11 *Geo.* 6 *c.* 51), *s.* 14 (2), *s.* 17 (1).

In 1924, the appellants, a quarrying company, owned freehold land, and had quarrying rights in other land, in the Malvern Hills. While the Malvern Hills Act, 1924, a local Act for the preservation of the beauties of the Malvern Hills (an area defined in s. 5 of the Act), was passing through Parliament, negotiations took place between the company and the promoters of the bill, the Malvern Conservators and Malvern Urban District Council. These negotiations resulted in an agreement between the parties that the company should continue to quarry on its freehold land, should surrender its quarrying rights in certain other land, should retain its quarrying rights in the N. area, and should have transferred to it additional quarrying rights in certain other parts of that area. The terms were embodied in heads of

agreement which contemplated a deed being executed subsequently and which were set out in a schedule to the Act. By s. 54 of the Act it was provided that: " For the protection of the [company] . . . the heads of agreement . . . are hereby confirmed and made binding on [the parties] and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement ". By deed dated Dec. 14, 1925, duly executed by all the parties, the areas in which the company should and should not quarry were defined. On Nov. 17, 1947, the company applied for planning permission to develop for quarrying purposes two of the areas of land agreed for quarrying. One of these areas, the T. area, was freehold property of the company, and the other was the N. area. On Sept. 30, 1953, the Minister refused permission to work parts of the T. area, granted permission to work the remainder of the T. area on conditions and only until June 30, 1966, and refused permission for any work in the N. area except to the extent necessary to ensure safety. By the Town and Country Planning General Development Order, 1950, art. 3 (1) and sched. 1, class xii, permission was given for " Development authorised by any local or private Act of Parliament . . . being an Act . . . which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out ". In December, 1954, the company brought an action against the Ministry of Housing and Local Government and the county council of the Administrative county of Worcester for, inter alia, a declaration that it was entitled to carry out the proposed development without obtaining any special development permission. The Ministry objected that the court had no jurisdiction to adjudicate whether the company needed to apply for planning permission, contending that the question was exclusively within the Minister's jurisdiction under s. 17 of the Town and Country Planning Act, 1947. It was not disputed that the nature of the development and the land on which it was to be carried out was designated by the Act of 1924, but it was contended that work was not " authorised " by that Act.

HELD: (i) the company were not confined to the procedure provided by s. 17 of the Town and Country Planning Act, 1947, because s. 17 did not create a new remedy for enforcing a new statutory right but created a means of ascertaining the extent of statutory liabilities, and because the jurisdiction of the court to make a declaration was not ousted without clear words having that effect, and such words were not present in s. 17.

Barraclough v. *Brown* (1897), 62 J.P. 275, distinguished.

(ii) the effect of s. 54 of the Malvern Hills Act, 1924, was to " authorise " (in the sense of approving or countenancing) the company's working of quarries within the limits of para. 1 of sched. 4 to the Act of 1924 (including authorising the working of the company's freehold, the T. area), and was not merely to make the heads of agreement contractually binding; accordingly the development was permitted unconditionally by art. 3 of the General Development Order, 1950, and no further application for planning permission was needed.

R. v. *Midland Ry. Co.* ((1887), 19 Q.B.D. 540) distinguished.

Decision of the COURT OF APPEAL (1958), 122 J.P. 182, reversed.

APPEAL by Pyx Granite Co., Ltd., quarry owners, from an order of the Court of Appeal (LORD DENNING, HODSON and MORRIS, L.JJ.), dated Feb. 7, 1958, and reported 122 J.P. 182, reversing a decision of LLOYD-JACOB, J. (sitting as an additional judge of the Queen's Bench Division), dated Apr. 16, 1957, declaring (i) that the carrying on of quarrying operations for the winning and making of stone at and in the appellant company's lands and quarries known as Tank Quarry, Scar Rock Quarry and North Quarry, situate in the urban district of Malvern in the county of Worcester was development within the meaning of the Town and Country Planning Act, 1947, which was included in class xii of Part 1 of sched. 1 to the Town and Country Planning (General Development) Order, 1948, and permitted unconditionally by art. 3 thereof and thereafter was included in class xii of Part 1 of sched. 1 to the Town and Country Planning General Development Order, 1950, and which was accordingly permitted unconditionally by art. 3 thereof; and (ii) that the decisions of the Minister dated Sept. 5, 1949, and Sept. 30, 1953, were of no effect in so far as they purported to refuse permission to carry out such quarrying operations, and were of no effect in so far as they purported to grant permission subject to conditions; and that

these decisions in no way limited or took away the appellant company's rights to carry on quarrying operations under and by virtue of the unconditional permission given by art. 3 of the Orders of 1948 and 1950. The respondents were the Ministry of Housing and Local Government and the County Council of the Administrative County of Worcester. The facts are summarised in the headnote.

Willis, Q.C., and *W. Scrivens* for the appellant company.

Squibb, Q.C., *J. R. Cumming-Bruce* and *A. P. Leggatt* for the respondents.

Their Lordships took time for consideration.

July 6. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the relevant facts and instruments are so fully stated in the opinion of my noble and learned friend, LORD JENKINS, which I have been privileged to read, that I recall at once what are the questions which your Lordships have to decide in this case. There are at least two questions of primary importance which must be determined, two further questions which have been fully argued but in the view that I take of the first two questions no longer arise, and, finally, a fifth question which has given me more difficulty than any other largely because it was little, if at all, discussed in the Court of Appeal and we have not the advantage of the opinion of that court on it.

The first question, my Lords, is this. The appellant company are entitled as freeholders, leaseholders or licensees to carry on quarrying operations for the working and winning of stone on certain lands which I will call part of the Malvern Hills. I leave for future consideration the question whether that is an accurate description; it is, in substance, the fifth question that I have mentioned. It is indisputable that such operations constitute " development " within the meaning of the Town and Country Planning Acts. From this it follows that such operations cannot be carried on without the permission of the relevant authority, whether the local planning authority or the proper Minister, at first the Minister of Town and Country Planning and later the Minister of Housing and Local Government. The question is whether such permission has, in fact, been given, and it is to be resolved by a consideration of two instruments, first, the Town and Country Planning (General Development) Order, 1948, made under the authority of the Town and Country Planning Act, 1947, which for this purpose may be read as one with a similar order of 1950 (I will refer to it as " the development order ") and, secondly, a private Act known as the Malvern Hills Act, 1924. By art. 3 of the development order, the validity of which has not been challenged, it was provided that, subject as therein mentioned, development of any class specified in sched. 1 thereto was thereby permitted and might be undertaken on land to which the order applied without the permission of the local planning authority or the Minister. Schedule 1 contains in class xii the words material to the decision of this case. They are:

> " Development authorised by any local or private Act of Parliament or by any order approved by both Houses of Parliament, being an Act or order which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out."

I will assume that the Malvern Hills Act, 1924, to which I will refer as the " private Act ", designates specifically the nature of the development and the land on which it may be carried out, and I turn to the question which has been the sole issue in this part of the case, viz., was the development authorised by the private Act? On this question differing opinions have been expressed.

LLOYD-JACOB, J., thought that it was authorised; in the Court of Appeal LORD DENNING and HODSON, L.J., largely relying on *R.* v. *Midland Ry. Co.* (1), thought it was not, while MORRIS, L.J., distinguished that case and upheld the view of LLOYD-JACOB, J. I think that MORRIS, L.J., was right.

My Lords, in the year 1924 the Malvern Hills Conservators, a body appointed under earlier Acts whose duty it was to preserve and control the Malvern Hills for the benefit of the public, promoted a bill for the extension and definition of their powers. It was opposed by the appellant company, whose interest lay in the quarrying of stone on their land. As commonly happens in such cases a compromise was reached. It was embodied in a clause which became s. 54 of the Act and was in these terms:

> " For the protection of the Pyx Granite Co., Ltd. (in this section referred to as ' the company ') the following provisions shall unless otherwise agreed in writing between the company and the conservators of the Malvern council have effect (that is to say):—The heads of agreement as set forth in sched. 4 to this Act are hereby confirmed and made binding on the company and the conservators and the Malvern council and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement."

Postponing comment on a section which is, in some respects, remarkable, I turn to the scheduled heads of agreement, and I find myself so fully in agreement with MORRIS, L.J., in his description of their tenor and effect in conjunction with the Act that I take the liberty of quoting it and adopting it as my own. He said:

> " That Act was one which effected most carefully worked out planning in regard to the Malvern Hills. The conservators were given additional powers. The company agreed to a limitation and fixation of their rights. From their previously existing rights something was extracted, and to them something else was added. The company's rights were limited, outside their freehold property, to a defined quarryable area. It was implicit in the agreement made that the continuing rights of the company to quarry on their freehold area were recognised. The company were to supply the council with stone for the repair of roads. The company were to put in repair a quarry road between certain defined points, and were to keep such road in repair. The company were to widen the quarry road to permit of a footpath by the side of it. The company were to be at liberty to make and use a tunnel under the area of land dividing their freehold property from the quarries which the council were handing over to the company. All this elaborately worked out detailed planning was, in my judgment, formally approved by Parliament when it provided by s. 54 that ' for the protection of the company [the Act should] only apply to or affect the undertaking, property or rights of the company subject to the provisions of the heads of agreement '. It seems to me that formal approval and sanction were given by Parliament to the activities of the company as planned and arranged within the scope of the agreement that was made. In this way the activities of the company which constituted ' development ' were, in a very real sense, ' authorised ' by the Act of 1924. Parliament enacted that the specific arrangements (under which the range of the company's activities was defined and limited) were confirmed and made binding on the company, the conservators and the Malvern council. I feel impelled to the view that Parliament authorised the arrangements which it confirmed and made binding."

(1) (1887), 19 Q.B.D. 540.

I emphasise that, as the learned lord justice points out, s. 54 of the private Act is expressed to be " for the protection of the company ", and that no better protection from the obligations or liabilities that would otherwise be imposed on it could be provided than by the limiting words of the last lines of the section. But for this section and these words in particular, quarrying would be subject to restriction. Their presence means that the company can claim the authority of Parliament to continue their operations. It would, I think, be taking too narrow a view of the meaning of the word " authorised " to exclude from its scope such a result. I do not think it necessary to refer to head 14 of the heads of agreement, or to the litigation to which it gave rise. They do not affect the single question for your Lordships' determination, viz., whether the proposed development is " authorised " by the private Act. It is, however, proper to note that, in the year 1925, the parties entered into a formal agreement as contemplated by head 18. Grave difficulties might have arisen if there had been substantial departure from the terms of the heads of agreement, and I do not venture to say what then might have been the result of the words " unless otherwise agreed ", etc., in s. 54. Fortunately that question does not arise.

My Lords, I think that the other members of the Court of Appeal might have come to the same conclusion but for *R.* v. *Midland Ry. Co.* (1) to which I have referred. That case is not binding on your Lordships, but it is of respectable antiquity and I see no reason to challenge its correctness. But it is, for the reasons given by Morris, L.J., clearly distinguishable. I would again respectfully adopt what he has said, but I would add that, in the present case, the confirmation of the agreement, the feature which it has in common with the agreement in the cited case, is attended by another feature which is wholly absent from that case, viz., the emphatic provision in the last lines of the section to which I have more than once referred. I conclude, therefore, this part of the case by saying that the proposed development by the appellant company fell within class xii of the development order and permission was, in my opinion, not required. I should add here that it was conceded by the respondents that, in their submission to this effect, the appellant company were not prejudiced by the fact that they made an application to the Minister which they subsequently asserted to be unnecessary.

I come now to the second question which must be decided. It was submitted by the respondents that the court had no jurisdiction to entertain the action. It was urged that s. 17 of the Act supplied the only procedure by which the subject could ascertain whether permission is necessary for the development of his land. That section enacts that, if any person who proposes to carry out

> " any operations on land . . . wishes to have it determined . . . whether an application for permission in respect thereof is required under this Part of this Act having regard to the provisions of the development order, he may . . . apply to the local planning authority to determine that question."

This matter is somewhat complicated by the fact that, under other sections of the Act, the Minister may " call in " the application for his own determination. But nothing turns on this, for, whether the application is heard in the first place by the local planning authority and then on appeal by the Minister, or is heard in the first place on a " call in " by the Minister, his determination is expressed to be final. The question is whether the statutory remedy is the only remedy and the right of the subject to have recourse to the courts of law is excluded. Obviously it cannot altogether be excluded; for, as Lord Denning has pointed

(1) (1887), 19 Q.B.D. 540.

out, if the subject does what he has not permission to do and so-called enforcement proceedings are taken against him, he can apply to the court of summary jurisdiction under s. 23 of the Act and ask for the enforcement notice to be quashed, and he can thence go to the High Court on Case Stated. But I agree with LORD DENNING and MORRIS, L.J., in thinking that this circuity is not necessary. It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as MCNAIR, J., called it in *Francis* v. *Yiewsley & West Drayton U.D.C.* (1), a "fundamental rule" from which I would not for my part sanction any departure. It must be asked then what is there in the Act of 1947 which bars such recourse. The answer is that there is nothing except the fact that the Act provides him with another remedy. Is it then an alternative or an exclusive remedy? There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and, as we like to call it, the inalienable remedy of Her Majesty's subjects to seek redress in her courts is taken away. And it appears to me that the case would be unarguable but for the fact that, in *Barraclough* v. *Brown* (2) on a consideration of the statute there under review it was held that the new statutory remedy was exclusive. But that case differs vitally from the present case. There the statute gave to an aggrieved person the right in certain circumstances to recover certain costs and the expenses from a third party who was not otherwise liable in a court of summary jurisdiction. It was held that that was the only remedy open to the aggrieved person and that he could not recover such costs and expenses in the High Court. LORD HERSCHELL said:

> "I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

Or as LORD WATSON said: "The right and the remedy are given uno flatu, and the one cannot be dissociated from the other". The circumstances here are far different. The appellant company are given no new right of quarrying by the Act of 1947. Their right is a common law right and the only question is how far it has been taken away. They do not uno flatu claim under the Act and seek a remedy elsewhere. On the contrary, they deny that they come within its purview and seek a declaration to that effect. There is, in my opinion, nothing in *Barraclough* v. *Brown* (2) which denies them that remedy, if it is otherwise appropriate.

The appropriateness of the remedy was the final point on this part of the case. It was urged that, even if the court had jurisdiction to make the declaration claimed, it was a discretionary jurisdiction which should not be exercised in this case. My Lords, this plea should not, in my opinion, prevail. It is surely proper that, in a case like this involving, as many days of argument showed, difficult questions of construction of Acts of Parliament, a court of law should declare what are the rights of the subject who claims to have them determined. I do not dissent from the contention of the respondents that, where the administrative or the quasi-judicial powers of the Minister are concerned, declaratory judgments should not readily be given by the court. But here, if ever, was a case where the jurisdiction could properly be invoked. It might even be thought surprising that the Minister should not be glad to have such questions authoritatively determined.

(1) [1957] 3 All E.R. 529; [1958] 1 Q.B. 478.
(2) 62 J.P. 275; [1897] A.C. 615.

These two questions being thus determined, viz., that the court has jurisdiction to declare that the development proposed by the appellant company does not require the Minister's permission and that such a declaration ought to be made, two other questions which occupied the courts below need not be considered. They were (i) whether the Minister could lawfully annex certain conditions to the limited permission that he gave, and (ii) whether their legality could be challenged except by certiorari. If no permission was required, the question of the legality of annexed conditions cannot arise.

The fifth and final question has caused me much difficulty. It is a question which, if the private Act had been drafted with proper care, could never have arisen, and it does not appear to have been seriously raised, at any rate in the Court of Appeal. I have doubted whether it is permissible to raise it in this House. But I have come to the conclusion, with which I think your Lordships agree, that, if only to quiet doubts, the matter should be disposed of. The question is no less than what is the area which is the subject of the private Act and, therefore, the area in respect of which under the Act of 1947 permission for development is not required. And it is the more strange that there should be any doubt about this, when it appears that the land, about which the doubt may arise, is for the purpose of quarrying operations the most important to the appellant company. The difficulty, my Lords, arises initially from the language of s. 5 of the private Act which defines the area of the conservators' jurisdiction. It is said to

> "comprise the lands rights and interests described in sched. 1, sched. 2 and sched. 3 to this Act together with all lands common or waste over which the conservators now have or may hereafter acquire rights and interests all of which are in this Act referred to as 'the Malvern Hills'."

The meaning of the expression "all lands common or waste" has been debated, and it has been urged that, since common and waste are themselves a kind of land, these words must be read as adjectivally qualifying lands and the expression must be read as if it were "common or waste lands". The result of this would be to exclude from the conservators' jurisdiction any land in which they might have or acquire any right or interest other than common or waste land. So strange a consequence must be avoided if any other interpretation is possible. I think that it is, for I do not regard it as extravagant to suppose that the draftsman of this Act, if only ex majore cautela, thought it proper to add "common or waste" in case it should be supposed that they were not "lands". It is legitimate to add that, if common or waste lands only were intended, the transposition to "lands common or waste" is one that requires explanation, which is not forthcoming. I conclude then that "the Malvern Hills" include any freehold land in which the conservators had on the passing of the private Act any right or interest. Now the appellant company were the owners of the freehold of a parcel of land immediately adjoining other land over which they had quarrying rights and which were beyond doubt part of the Malvern Hills. On it was situate a quarry known as Tank Quarry, and it is common ground that the working of this quarry was as important to them as was the control of such working essential to the conservators. It would not, therefore, be surprising to find that any bargain between them dealt with this land. And so it was. For the agreement between them, both the heads scheduled to the private Act and the formal agreement executed in 1925, provided that the conservators should have an option within a limited time to purchase the undertaking of the appellant company. The undertaking included the land in question. Therefore, this land was land in which the conservators had at the time of the passing of the Act or

by virtue of the agreement acquired an undoubted right or interest. It fell forthwith within the description of Malvern Hills in the private Act, and thenceforward retained that label whether or not the option was exercised. It is satisfactory to note, though I should not be prepared to rely on the doctrine of contemporanea expositio in such a case, that it is in this way that the parties, particularly in the formal agreement of 1925, interpreted the private Act and its schedules.

I am, therefore, of opinion that the freehold land in question is land in respect of which permission for development was not required, and I would allow this appeal and restore the judgment of LLOYD-JACOB, J., with costs here and below.

LORD GODDARD: My Lords, the appellants in this case seek a declaration whether or not they require planning permission for the working of quarries either on their freehold land or on land leased to them. The respondents contended that this question was within the exclusive jurisdiction of the Minister, either by way of appeal from the planning authority, or if, as happened here, he had called in the case for his own decision in the first instance. In support of this contention, the respondents relied on the decision of this House in *Barraclough* v. *Brown* (1). What that case decided was that, where a statute conferred a right, which had not hitherto existed, to recover certain expenses in a court of summary jurisdiction, it was to that court alone to which recourse must be had and that those seeking to recover the expenses could not first ask the High Court to declare that the right to recover existed. It was for the court indicated by the statute to decide both as to the right and the amount. I agree with the majority in the Court of Appeal, who held that this decision had no application to the facts of this case, and that there were no words in the statute which deprived the appellant company of their right to obtain a declaration. It was also argued that, if there was a remedy obtainable in the High Court, it must be by way of certiorari. I know of no authority for saying that, if an order or decision can be attacked by certiorari, the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive though, no doubt, there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari.

The main question in this appeal is whether the proposed development on the appellant company's land is authorised by any local or private Act of Parliament, for if it is, no planning permission is required. The statutory authority relied on is s. 54 of the Malvern Hills Act, 1924, which gives effect to, and makes binding on, the appellant company, the conservators and the Malvern council certain heads of agreement which are set out in sched. 4 to the Act. In the Court of Appeal, relying on *R.* v. *Midland Ry. Co.* (2), LORD DENNING put the question succinctly in this way: Does the section make the heads of agreement binding as a contract, simply dispensing with the execution by the parties, or does it make them as binding as a statute giving them the same force as if enacted in the statute itself? On this question I am in full agreement with the judgment of MORRIS, L.J. He held that the statute conferred protection on the appellant company, recognising their existing rights in respect of their freehold property and governing and defining their other rights. The section is inserted in the Act expressly for the protection of the appellant company, and provides that the Act is only to apply to the undertaking, property or rights of the appellant company subject to the provisions of the heads of agreement. In my opinion, the protection

(1) 62 J.P. 275; [1897] A.C. 615.
(2) (1887), 19 Q.B.D. 540.

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given by the section extends to the freehold property as well as to the leaseholds. The heads of agreement limit the rights of the appellant company of quarrying outside their freehold, and thereby impliedly recognise the right of quarrying inside it. Accordingly, in my opinion, development by quarrying is authorised by the statute and no planning permission is required. It is, therefore, unnecessary to consider the validity of the conditions which the Minister purported to impose, and I would allow the appeal.

LORD OAKSEY: My Lords, I have had the opportunity of reading the opinion of my noble and learned friend, LORD GODDARD, and I agree with it.

LORD KEITH OF AVONHOLM: My Lords, I have had the advantage of reading the opinion to be delivered by my noble and learned friend, LORD JENKINS, and agree with the result at which he has arrived and with his reasons, with one qualification.

I have difficulty in agreeing that the appellant company's freehold land, which was the site of the Tank Quarry, was within the jurisdiction of the conservators in terms of s. 5 of the Malvern Hills Act, 1924, and so was part of the area defined under that section as " the Malvern Hills ". The only power, as I see it, that the conservators had with reference to that area, and even here I have great doubt, is under the option given them by para. 12 of sched. 4 to purchase the appellant company's undertaking as a going concern in the third, fourth or fifth year after the passing of the Act. The purchase of the undertaking would, I think, have stopped all quarrying operations by the appellant company in their quarrying area (including their freehold land). Whether it would have transferred the freehold to the conservators is much more doubtful. But this power, whatever its effect, could not, I think, bring the freehold land within the jurisdiction of the conservators under s. 5 until it was exercised. It was not exercised and is now spent. I have difficulty in seeing how, on any view, it can now be within their jurisdiction.

But that does not, in my opinion, affect the result of this appeal. Section 54 of the Act of 1924 provides that the provisions of the Act shall only apply to or affect the undertaking property or rights of the appellant company subject to the provisions of the heads of agreement set forth in sched. 4. The first head of this agreement says:

> " The company's rights of quarrying to be limited (outside their freehold property) to the quarryable area at North Malvern defined [on the Islington plan]."

I read this as meaning that the quarrying rights are to be limited except with regard to the freehold property. The only thing that could have affected this unlimited right might have been acquisition of the undertaking under head 12 of the agreement. Just as the limited quarrying rights were, I think, authorised by the Act, so I think the unlimited rights were authorised by the Act. I, accordingly, agree that this appeal should be allowed.

LORD JENKINS: My Lords, the litigation in which this appeal arises concerns a dispute between the appellant company (hereinafter called " the company ") and the respondent Ministry and county council on the question whether (as contended by the company) the working by the company after the appointed day of (so far as now material) two granite quarries in the Malvern Hills known respectively as the Tank Quarry and the North Quarry, which admittedly constitutes development within the meaning of the Town and Country Planning Act, 1947, is development which was unconditionally permitted under art. 3 of sched. 1 to the Town and Country Planning (General Development) Order, 1948, made in pursuance of s. 13 of that Act. The company contend that this

question should be answered in the affirmative on the ground that such working is within the meaning of class xii in such schedule,

> " Development authorised by any local or private Act of Parliament . . . being an Act . . . which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out,"

the Act relied on by the company as having authorised the development being the Malvern Hills Acts, 1884 to 1924. If the company's contention to the above effect is well founded, it is common ground that the permission which (as hereinafter appears) the Minister purported to grant to the company under s. 14 and s. 15 of the Act to work the quarries on certain conditions was wholly inoperative, inasmuch as the company already had unconditional permission to work them under the order. If, on the other hand, this contention fails, and the question of permission must accordingly be taken to have remained at large for the Minister's decision, the company contends that certain of the conditions which the Minister purported to impose were ultra vires, and that the permission must, therefore, take effect free of those conditions.

On Dec. 21, 1954, the company commenced the present action claiming relief in the shape of declarations framed with a view to establishing the contentions to which I have briefly referred. The respondents took a preliminary objection to the effect that the court had no jurisdiction to adjudicate on the company's claim that the working of the quarries was development falling within the terms of class xii in sched. 1 to the order, and, therefore, unconditionally permitted, on the ground that the statutory procedure for the determination of questions such as this provided by s. 17 of the Act was exhaustive, and that the jurisdiction thereby conferred on the local authority or the Minister was exclusive. The respondents also raised a preliminary objection with respect to the company's subsidiary contention that, even if the permission granted by the Minister was otherwise operative, certain of the conditions attached to it were ultra vires. This objection was to the effect that the validity of the conditions imposed by the Minister could only be challenged by certiorari, the time for which was long past, and not by an action for a declaration; and further that, in any event, the court should on principle refuse to interfere by declaration in a matter essentially depending on the Minister's discretion.

The case was heard by LLOYD-JACOB, J., who decided in favour of the company on all points, and by his judgment dated Apr. 16, 1957, granted the declarations sought. The respondents appealed from the judgment, and on Feb. 7, 1958, the Court of Appeal (LORD DENNING, HODSON and MORRIS, L.JJ.) by a majority (MORRIS, L.J., dissenting) allowed the appeal. LORD DENNING rejected the respondents' preliminary objection based on s. 17 of the Act, so far agreeing with MORRIS, L.J. HODSON, L.J., on the other hand was for upholding it. LORD DENNING, agreeing in this with HODSON, L.J., held that the development constituted by the working of the quarries was not " authorised " by the Malvern Hills Acts within the meaning of class xii of sched. 1 to the order. MORRIS, L.J., on the other hand, held that this development was so authorised. As to the validity of the conditions, and the preliminary objection that this question could not be made the subject of a declaration, LORD DENNING rejected the preliminary objection, but held that the conditions were valid. HODSON, L.J., agreed that the conditions were valid. He doubted whether the Minister's decision could be impeached by declaration, and, moreover, was of opinion that, if the Minister's decision could be so impeached, the result of declaring the conditions invalid could only be to destroy the entire permission. In the view taken by MORRIS, L.J., on the rest of the case the questions as to the validity of the conditions and

the right of the company to seek a declaration thereon did not arise, but he intimated that if he had shared the view that they did arise, he would have agreed with LORD DENNING'S conclusions in regard to them. From that judgment the company now appeals to your Lordships' House.

It is not surprising that the case has been the subject of a conflict of judicial opinion in the courts below, for it raises questions of considerable difficulty. To make discussion of the points at issue intelligible I should next refer to some of the provisions of the Act of 1947. Section 12 provides, by sub-s. (1) and sub-s. (2), as follows:—

"(1) Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day.

"(2) In this Act, except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land . . ."

Section 13 provides, by sub-s. (1) and sub-s. (2), as follows:—

"(1) The Minister shall by order provide for the grant of permission for the development of land under this Part of this Act, and such permission may be granted—(a) in the case of any development specified in any such order, or in the case of development of any class so specified, by that order itself; (b) in any other case, by the local planning authority (or, in the cases hereinafter provided, by the Minister) on an application in that behalf made to the local planning authority in accordance with the provisions of the order.

"(2) An order under sub-s. (1) of this section (hereinafter called a 'development order') may be made either as a general order applicable (subject to such exceptions as may be specified therein) to all land, or as a special order applicable only to such land as may be so specified, and the permission granted by any such order may be granted either unconditionally or subject to such conditions or limitations as may be so specified."

Section 14 provides, by sub-s. (1), as follows:—

"Subject to the provisions of this and the next following section, where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations."

Section 15 provides as follows:—

"(1) The Minister may give directions to any local planning authority, or to local planning authorities generally, requiring that any application for permission to develop land, or all such applications of any class specified in the directions, shall be referred to the Minister instead of being dealt with by the local planning authority, and any such application shall be so referred accordingly.

"(2) Where an application for permission to develop land is referred to the Minister under this section, the provisions of sub-s. (1) and sub-s. (2) of the last foregoing section shall apply, subject to any necessary modifications, in relation to the determination of the application by the Minister as they

apply in relation to the determination of such an application by the local planning authority: Provided that before determining any such application the Minister shall, if either the applicant or the local planning authority so desire, afford to each of them an opportunity of appearing before and being heard by a person appointed by the Minister for the purpose.

" (3) The decision of the Minister on any application referred to him under this section shall be final."

Section 16 provides:—

" (1) Where application is made under this Part of this Act to a local planning authority for permission to develop land, or for any approval of that authority required under a development order, and that permission or approval is refused by that authority, or is granted by them subject to conditions, then if the applicant is aggrieved by their decision he may by notice served within the time, not being less than twenty-eight days from the receipt of notification of their decision, and in the manner prescribed by the development order, appeal to the Minister: . . .

" (2) Where an appeal is brought under this section from a decision of the local planning authority the Minister may allow or dismiss the appeal or may reverse or vary any part of the decision of the local planning authority, whether or not the appeal relates to that part, and deal with the application as if it had been made to him in the first instance; and the provisions of the last foregoing section shall apply, subject to any necessary modifications, in relation to the determination of an application by the Minister on appeal under this section as they apply in relation to the determination by the Minister of an application referred to him under that section."

Section 17 provides as follows:—

" (1) If any person who proposes to carry out any operations on land or make any change in the use of land wishes to have it determined whether the carrying out of those operations or the making of that change in the use of the land, would constitute or involve development of the land within the meaning of this Act, and, if so, whether an application for permission in respect thereof is required under this Part of this Act having regard to the provisions of the development order, he may, either as part of an application for such permission, or without any such application, apply to the local planning authority to determine that question.

" (2) The foregoing provisions of this Part of this Act shall, subject to any necessary modifications, apply in relation to any application under this section and to the determination thereof as they apply in relation to applications for permission to develop land and to the determination of such applications: Provided that where it is decided by the Minister under any of the said provisions that any operations or use to which an application under this section relates would constitute or involve development of the land, or that an application for permission is required as aforesaid in respect thereof, that decision shall not be final for the purposes of any appeal to the court under the provisions of this Part of this Act relating to the enforcement of planning control, in relation to those operations or that use."

Section 23 deals with enforcement of planning control. Subsection (1) enables the local planning authority to serve an enforcement notice in respect of any development carried out without permission or in breach of conditions, and such notice (by sub-s. (2))

" may . . . require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations."

Subsection (4) gives a right of appeal to a court of summary jurisdiction, and sub-s. (5) gives a right of appeal from the court of summary jurisdiction to a court of quarter sessions. Section 26 and s. 27 in certain cases empower the local planning authority by order confirmed by the Minister to require the discontinuance of authorised uses of land subject to compensation in respect of any damage shown to have been suffered by any person in consequence of the order. These provisions have not been resorted to in the present case. Section 118 (1) declares " for the avoidance of doubt " that the provisions of the Act are applicable to land regulated by special enactments, but again this provision has not been resorted to here.

The planning history of the matter is briefly this. The Town and Country Planning Act, 1947, which repealed a number of earlier enactments relating to town and country planning, received the royal assent on Aug. 6, 1947, but did not come into operation until the appointed day fixed under s. 120 of the Act, namely July 1, 1948. Between those two dates, namely on Nov. 17, 1947, the company made an application to the Malvern Urban District Council under the repealed enactments for permission to develop the land on which their quarries were situated

" for quarrying purposes including mining or quarrying operations . . . tipping, and the usual processing and manufacture for sale thereof as heretofore."

This application included a reference to the " special statutory control of amenities " in the area by the Malvern Hills Conservators, but it is clear that the company cannot at that time have appreciated the vital bearing the Malvern Hills Acts, 1884 to 1924, might have on the question of permission. By virtue of the transitional provisions contained in sched. 10 to the Act of 1947 this application was treated as having been made on the appointed day under s. 14 of that Act.

The next step was a direction by the Minister dated Jan. 14, 1948, under the repealed enactments, which, by virtue of the transitional provisions aforesaid, was treated as a direction given on the appointed day under s. 15 of the Act of 1947, that is to say a direction that the company's application should be referred to the Minister instead of being dealt with by the local planning authority. Next, after the Act of 1947 had come into force, there was a letter dated Sept. 5, 1949, from the Minister giving the company permission to work the North Quarry (which had developed a dangerous fault) only to the extent necessary to ensure safety, and subject to certain other conditions. On June 11, 1952, the Minister informed the company that a public local inquiry was to be held in regard (inter alia) to the company's application of Nov. 17, 1947, and such inquiry was in due course held. Finally, by a letter dated Sept. 30, 1953, to the company the Minister informed them of his decision on their application. That letter contained this passage:

" At the inquiry it was contended, on behalf of the applicants, that the quarrying operations proposed were development included in class xii of sched. 1 to Part 1 of the Town and Country General Development Order, 1950, in respect of which permission had been granted by art. 3 of that order. The Minister is advised, however, that notwithstanding the provisions of the Malvern Hills Act, 1924, and the said order, permission is required for the continuance of the operations in question; and he must therefore deal with the application on its merits."

The effect of the Minister's decision was that he refused permission altogether in respect of the North Quarry area and parts of the Tank Quarry area, but granted permission with respect to the remainder of the Tank Quarry area subject to a number of conditions, including one to the effect that the winning and working of granite should be limited to a period ending June 30, 1966. The Minister went on to say that the permission granted by his decision of Sept. 5, 1949, was not affected by the present decision.

The General Development Order of 1948 which is relied on by the company as having, by art. 3 thereof, given unconditional permission for the development in question under class xii in sched. 1 thereto, came into force on the appointed day, namely July 1, 1948, that being also the date on which the company's application was treated as having been made under the Act of 1947 by virtue of the provisions in sched. 10 to that Act. As from May 22, 1950, the General Order of 1948 was replaced by the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), but the Order of 1950 preserved in art. 3 thereof and in class xii in Part 1 of sched. 1 thereto the effect of art. 3 of and class xii in sched. 1 to the 1948 General Order, and, accordingly, there is no material distinction between the two orders for the present purpose. Both orders contained in art. 4 provisions under which a direction excluding the development now in question from the permission accorded by art. 3 could have been given, but these provisions have not been resorted to in the present case. This was how the matter stood when the company on Dec. 21, 1954, commenced their action against the respondent Ministry and county council for declaratory relief of the nature I have indicated and I may now return to the issues raised.

It will be convenient to deal first with the preliminary objection based on s. 17 of the Act. The argument for the respondents is of this nature. Section 15 (3) provides that the decision of the Minister on any application referred to him under that section is to be final. Section 16 (2) provides by reference to s. 15 (3) that the decision of the Minister on any application determined by him on an appeal from the local planning authority shall likewise be final. Section 17 itself provides, by sub-s. (2), that the foregoing provisions of Part 3 of the Act (which, be it observed, include s. 15 and s. 16) shall apply in relation to any application under s. 17 as they apply in relation to applications to develop land and to the determination of such applications. The effect of that clearly must be to make the Minister's decision under s. 17 (2) final, subject only to the proviso to sub-s. (2), under which a decision of the Minister to the effect that the relevant operations or use would constitute development or that an application for permission is required in respect thereof is not to be final for the purposes of any appeal to the court under the enforcement provisions of Part 3, the reference being to the right of appeal to a court of summary jurisdiction given by s. 23. In this context—so proceeds the argument—it is plainly the intention of s. 17 that, with the qualification introduced by the proviso to sub-s. (2), the Minister should have exclusive jurisdiction finally to determine whether any given operations on or change of use of land would constitute development, and, if so, whether an application for permission in respect thereof is required, just as he has exclusive jurisdiction finally to determine an application referred to him under s. 15, or coming before him on an appeal from the local planning authority under s. 16. The matters on which the Minister is empowered to adjudicate under s. 17 include the very point at issue here. In short, the statute has prescribed the tribunal which is to determine the matters referred to in s. 17 and, by so doing, has precluded recourse to any other tribunal.

I am not concerned to dispute that, where an application has been made, and referred to the Minister under s. 15, or brought before him on appeal under s. 16,

and he has made his decision thereon, the finality with which that decision is invested by the express terms of the Act could not be challenged by the applicant in proceedings against the Minister for a declaration to the effect that his decision was wrong. Nor am I concerned to dispute that a person who has applied for and obtained the Minister's ruling under s. 17 (1) of the Act is (subject only to the proviso to sub-s. (2) where applicable) similarly precluded from challenging its finality in any such proceeding. But, as I think, very fairly in the circumstances of the case, counsel for the respondents disclaimed the argument that the Minister's decision on the company's application referred to him under s. 15 of the Act now precludes the company from raising the contention that unconditional permission was automatically granted on the appointed day by the General Development Order of 1948, and that the application and the Minister's decisions thereon were, therefore, wholly ineffectual.

Accordingly, the respondents' preliminary objection is to be dealt with on the footing that this contention was one which it was open to the company to raise at the time of action brought, the only question being whether they were entitled to raise it, as they sought to do, by an action in the High Court for declaratory relief, or were, as the respondents contend, confined by the terms of the Act of 1947 to raising it for the decision of the local planning authority, or of the Minister on appeal, under s. 17 of the Act. The respondents contend that the company were so confined, on the ground that planning control is purely a creature of statute, that the statute creating it has prescribed by s. 17 a particular mode of deciding with respect to it questions of the nature described in s. 17, and, accordingly, that s. 17 must be construed as excluding recourse to any other tribunal for the decision of any question of that nature.

It is said that this proposition is warranted by the case in your Lordships' House of *Barraclough* v. *Brown* (1). In that case (to put it shortly) the undertakers of a certain navigation were by a private Act of Parliament empowered, in the event of any vessel being sunk in the navigation, to remove the vessel and to defray the expenses by sale or, if they thought fit, to "recover such expenses from the owner of such . . . vessel in a court of summary jurisdiction". The undertakers sued in the High Court the persons who had been the owners of the sunken vessel at the time of the sinking, but had ceased to be such before the expenses were incurred, claiming the amount of the expenses as damages recoverable at common law. It was objected that the court had no jurisdiction to entertain the action, and the undertakers sought to meet this objection by the argument that, even if they could not recover the expenses by an action in the High Court, they were at all events entitled to come to the High Court for a declaration that, on the true interpretation of the statute, they had a right to recover them. The undertakers failed in both courts below and in your Lordship's House. In holding that the appeal should be dismissed, LORD HERSCHELL said this:

> "Unwilling as I am to determine the appeal otherwise than on the merits of the case, I feel bound to hold that it was not competent for the appellant to recover the expenses, even if the respondents were liable for them, by action in the High Court. The respondents were under no liability to pay these expenses at common law. The liability, if it exists, is created by the enactment I have quoted. No words are to be found in that enactment constituting the expenses incurred a debt due from the owners of the vessel. The only right conferred is 'to recover such expenses from the owner of such vessel in a court of summary jurisdiction'. I do not think the appellant can

(1) 62 J.P. 275; [1897] A.C. 615.

claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

Dealing with the argument that a claim for a declaration could be maintained, he said this:

"It might be enough to say that no such case was made by the appellant's claim. But, apart from this, I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover—the very matter relegated to the inferior court—determined. Such a proposition was not supported by authority, and is, I think, unsound in principle."

LORD WATSON said this:

"The only right which the undertakers have to recover from an owner is conferred by these words: 'Or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge, or vessel in a court of summary jurisdiction'. The right and the remedy are given uno flatu, and the one cannot be dissociated from the other. By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters."

LORD SHAND said:

"I agree entirely with what had fallen from my noble friend LORD WATSON on both points. It appears to me that the jurisdiction which can alone be exercised in a case of this kind belongs to a court of summary jurisdiction, and that therefore this suit could not be properly initiated in the court in which it has been brought."

LORD DAVEY said:

"My Lords, I agree . . . that there is no common law right of action in this case, and that the High Court had no jurisdiction over the subject-matter of this action under the . . . Acts and that the appeal must consequently be dismissed. I only desire to express my dissent from the contention . . . that although the High Court could not make any judgment or give any relief in this action, the court might make a declaration binding the parties. In my opinion this is altogether wrong."

The principle which the respondents seek to call in aid is succinctly stated by WILLES, J., in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1), where he observed that there were three classes of cases in which liability might be established founded on a statute and said of the third:

"But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to. The company are bound to follow the form of remedy provided by the statute which gives them the right to sue."

(1) (1861), 11 C.B.N.S. 456.

In truth, the validity of the principle relied on by the respondents is not open to doubt. But the question is whether it is applicable in the present case, and in my opinion it is not.

Where a statute creates a new right which has no existence apart from the statute creating it, and the statute creating the right at the same time prescribes a particular method of enforcing it, then, in the words of LORD WATSON in *Barraclough* v. *Brown* (1) " the right and the remedy are given uno flatu, and the one cannot be dissociated from the other ". As LORD HERSCHELL put it in the same case, the party asserting the right cannot

> " claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

The principle is wholly apposite in cases comparable to *Barraclough* v. *Brown* (1). If A has a right founded entirely on a particular statute to recover a sum of money from B, and the statute goes on to provide that the sum in question may be recovered in proceedings of a particular kind, then it is wholly reasonable to impute to the legislature an intention that the sum in question, recoverable solely by virtue of the statute, should be recoverable in proceedings of the kind provided by the statute and not otherwise. The statute puts on B for the benefit of A a liability to which B could not otherwise be subjected, and at the same time prescribes a particular form of proceedings in which it may be enforced. No doubt B must then submit to being amerced to the extent and in the manner provided by the statute. But the incidents of the burden cast on B by the terms of the statute are not to be changed from or made more onerous than those which the statute provides, as they would be if A was at liberty to recover the sum in question, or seek a declaration of his right to recover it, in any other form of proceedings to which he might choose to have recourse. As it seems to me, the purpose underlying the principle is the protection of the person against whom the statutory right is asserted from oppression on the part of the person asserting it.

But how does the principle stand in relation to the planning legislation? The Act of 1947, so far as it relates to planning, cannot be said to confer uno flatu on a landowner statutory rights coupled with particular remedies for breaches of those rights. On the contrary, that Act restricts to a remarkable degree the ordinary right of a landowner to deal with his land as he pleases; and it might almost be said that the only rights it creates are rights conferred on the Minister and the local planning authorities for the purpose of performing their statutory duty in relation to the administration and enforcement of planning control. Section 17 of the Act of 1947 cannot, in my judgment, reasonably be described as conferring on landowners a special remedy for the enforcement of statutory rights. On the contrary, what it appears to me to do is to provide a cheap and expeditious procedure by which they can, if they so desire, ascertain the extent of the restrictions which, according to official opinion, are imposed by the Act on their ordinary rights as landowners. The company here cannot be said to occupy the position of the undertakers in *Barraclough* v. *Brown* (1). They are not seeking to enforce statutory rights by methods other than those prescribed by the Act creating them. They are merely seeking to ascertain the extent of their statutory liabilities. It is true that s. 17 itself may be said in a sense to create a statutory remedy in the shape of an application under it for the determination of any question of the kind to which it refers, but it is not a remedy for the breach

(1) 62 J.P. 275; [1897] A.C. 615.

of any statutory right. It is merely directed to the removal of doubts regarding the effect of the legislation in particular cases.

For these reasons, the principle of *Barraclough* v. *Brown* (1) has, in my judgment, no application here, and, apart from that principle, I can find no sufficient ground for holding that s. 17 provides an exclusive method of determining questions of the kind to which it relates, and deprives the courts of the jurisdiction which they ordinarily possess of determining by declaration questions of that description. Clear words would be necessary to produce this result, and, paying due regard to the terms of s. 17, and to the argument that it must be read in conjunction with s. 15 and s. 16, I cannot find any sufficient indication that it was intended to oust the jurisdiction of the court on any question which might have been made the subject of an application under s. 17. The section is permissive and not imperative. That in itself is not a circumstance of any positive weight (see the permissive language of the section in *Barraclough* v. *Brown* (1)); but the fact remains that it is not in terms made obligatory to apply under s. 17, which is at least consistent with the company's contention. Much more important is the circumstance that s. 17 made its first appearance in planning legislation in the Act of 1947. In its absence, the right now claimed by the company of going to the court for declaratory relief could hardly have been doubted. If the introduction of s. 17 had been intended to change the law by ousting the jurisdiction of the court on questions capable of being dealt with under the section, that important change would surely have been made in express terms. For the reasons which I have stated, I am of opinion that the preliminary objection fails.

This conclusion accords with the views expressed by McNair, J., and the Court of Appeal in *Francis* v. *Yiewsley & West Drayton U.D.C.* (2). That was a case in which a person served with an enforcement notice under s. 23 of the Act of 1947 did not avail himself of the right of appeal to a court of summary jurisdiction given by s. 23 (4), but applied to the court for a declaration that the enforcement notice was invalid. It was held that he was not precluded by the statutory provisions from applying to the court for relief and that he was entitled to the relief claimed. On the footing that the court had jurisdiction to entertain the action, I think that the case was clearly one in which the company, if they made good their contentions on the merits, could properly be given declaratory relief: see *Vine* v. *National Dock Labour Board* (3).

I may, therefore, now pass to the substantial issue in the case, viz., whether the company's quarrying operations constituted

> " Development authorised by any local or private Act of Parliament . . . which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out "

within the meaning of class xii in sched. 1 to the General Development Order of 1948. It is not in dispute that, if the company's quarrying operations were, within the meaning of class xii, " authorised " by the Malvern Hills Acts, 1884 to 1924, the additional requirement that the nature of the development so authorised and the land on which it might be carried out should be specifically designated by the legislation authorising it was satisfied in the present case. The case, therefore, turns substantially on the question whether this development was so authorised. I have so far referred collectively to the Malvern Hills Acts, 1884 to 1924. There were, in fact, three Acts passed respectively in 1884, 1909 and 1924. Of these, the Act of 1909 contains nothing of any relevance to the present dispute, while

(1) 62 J.P. 275; [1897] A.C. 615.
(2) [1957] 3 All E.R. 529; [1958] 1 Q.B. 478.
(3) [1956] 3 All E.R. 939; [1957] A.C. 488.

the Act of 1884 calls for no more than a passing reference. The statutory authorisation of the company's quarrying operations is to be found, if anywhere, in the Act of 1924. The Act of 1884 provided for the appointment of conservators who were given divers powers designed to protect the amenities of the Malvern Hills, but these powers were found to be inadequate to provide the protection intended, and the position at the time of the passing of the Act of 1924 is thus described in the preamble to that enactment:

> "And whereas in recent years the amenities of the Malvern Hills have been seriously interfered with by quarrying operations and by the erection of buildings sheds machinery and plant and those operations are being extended in such manner as to threaten to destroy the value of the Malvern Hills as objects of public interest as well as to impede the user and enjoyment thereof for purposes of public recreation and wholly to alter the state of the hills as they existed in the year 1884:
>
> "And whereas the powers of the existing conservators are insufficient to preserve the Malvern Hills from such quarrying operations and to prevent the erection of such buildings sheds machinery and plant as aforesaid and it is desirable that further provision should be made for the acquisition by the existing conservators of the manorial and other rights over the Malvern Hills and of other property or interests in the Malvern Hills or any part thereof and that further powers of protecting controlling and dealing with the Malvern Hills should be conferred upon the existing conservators as in this Act provided:
>
> "And whereas it is expedient that the area of jurisdiction of the existing conservators should be enlarged and their constitution altered as in this Act provided: . . ."

At the time of the passing of the Act of 1924, the company had for many years been operating granite quarries in the Malvern Hills, and at that time owned the freehold of the area known as the Tank Quarry and held leases or licences of the quarrying rights in additional areas lying to the south of the Tank Quarry area. It is unnecessary to discuss in detail the somewhat complicated history of these leases or licences.

The Act of 1924 must be referred to at some length. Section 2 contains a number of definitions, including the following:—

> "'The Minister' and 'the Ministry' mean respectively the Minister and the Ministry of Agriculture and Fisheries; . . . 'Revenues of the Conservators' includes the revenues of the conservators from time to time arising from the Malvern Hills or from any land or other property for the time being belonging to the conservators . . ."

Section 5 reads:

> "The area within the jurisdiction of the conservators for the purposes of this Act and the Acts of 1884 and 1909 shall comprise the lands rights and interests described in sched. 1, sched. 2 and sched. 3 to this Act together with all lands common or waste over which the conservators now have or may hereafter acquire rights and interests all of which are in this Act referred to as 'the Malvern Hills'."

By s. 7 (1)

> ". . . the existing conservators as re-constituted by this Act and their successors shall continue to be a body corporate by the name of 'the Malvern Hills Conservators' . . . having power to hold and manage lands."

Section 20 provides that the Malvern Hills shall be regulated and managed by the conservators under and in accordance with that Act and the Acts of 1884 and 1909. By s. 21, the conservators are required to preserve the natural aspect of the Malvern Hills and protect trees, etc. Section 22 and s. 23 are in these terms:

> " 22.—(1) Notwithstanding anything contained in the Acts of 1884 and 1909 the conservators are hereby authorised to purchase the whole of any portions of the lands properties quarries manorial rights and interests described in sched. 2 and sched. 3 to this Act and the owners thereof and other persons interested therein shall sell the same subject and according to the provisions of this Act and the Acts incorporated herewith.
>
> " (2) In assessing the amount of compensation to be paid under this Act to the owner of any quarry any obligations such owner may be under in regard to his employees shall be taken into account.
>
> " 23.—The powers of the conservators for the compulsory purchase of lands and other interests for the purposes of this Act shall cease after the expiration of five years from Dec. 31, 1924."

By s. 24 (1)

> " On the conservators giving notice of their intention to exercise their option to purchase the undertaking of the Pyx Granite Co., Ltd. . . . pursuant to the heads of agreement set forth in sched. 4 to this Act the conservators shall "

make a certain deposit.

By s. 25 (1), the conservators were empowered to make and enforce bye-laws to regulate quarrying in on or under the Malvern Hills; and by s. 25 (2), provision was made for the payment by the conservators of compensation to any owner, lessee or occupier injuriously affected by the operation of any bye-law so made.

By s. 26 (1), the Minister was empowered at any time on the application of the conservators and after holding a local inquiry to make an order or orders to prohibit quarrying on any part of the Malvern Hills specified in such order or orders. By s. 26 (2), provision was made for the payment of compensation by the conservators to persons whose interests might be affected by such order. By s. 27, the Minister was empowered, after an application had been made to him by the conservators under s. 26 and had not been withdrawn, to make a temporary order or temporary orders to prohibit quarrying on the lands to which such application related. Section 54 provides as follows:—

> " For the protection of the Pyx Granite Co., Ltd. (in this section referred to as ' the company ') the following provisions shall unless otherwise agreed in writing between the company and the conservators and the Malvern council have effect (that is to say):—The heads of agreement as set forth in sched. 4 to this Act are hereby confirmed and made binding on the company and the conservators and the Malvern council and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement."

Schedule 2 to the Act, headed " Lands and quarries authorised by this Act to be acquired by the conservators ", contains no reference to the Tank Quarry. Schedule 4 to the Act headed

> " Heads of Agreement between the Pyx Granite Co., Ltd. and the conservators and the Malvern Urban District Council "

includes the following provisions:—

> " 1. The company's rights of quarrying to be limited (outside their freehold property) to the quarryable area at North Malvern defined on a plan

to be signed by the Right Honourable the Lord Islington the Chairman of the Committee of the House of Lords to whom the bill is referred a copy of which is to be supplied by the conservators to the company.

" 2. The company to surrender the remaining area held by them under the Gandolfi licences but to be at liberty to work under the Berington lease until it expires. That lease is not to be renewed.

" 3. The Malvern Urban District Council (hereinafter referred to as 'the council ') to transfer to the company their interest as lessees or tenants of the two quarries at North Malvern which they hold and the company to purchase by agreement or by valuation the plant and machinery of the council now there.

" 4. The company to supply the council with all stone they require for repair of roads in their area at 7s. 9d. per ton at the quarry subject to variation of price according to variations in wages.

" 5. The council to extend the company's existing licences so far as they affect the areas which the company may under cl. 1 work to June 24, 1960, on the same terms as at present affect such areas respectively under the present licences.

" 6. The conservators and the council to arrange for the grant to the company of a licence to work the present council's quarries within the area mentioned in cl. 1 to June 24, 1960, on the terms of the existing 1910 licence so far as applicable.

. . .

" 10. The company to exclude from its operations the playground hatched black on the plan and not to affect injuriously the existing reservoir and aqueduct on the land numbered 10 on the deposited plan in the parish of Malvern.

" 11. The conservators to be at liberty to plant trees on the disused quarry dumps at the North Malvern quarries the work to be done to the satisfaction of the company.

" 12. The conservators to have an option to purchase the company's undertaking as a going concern at the expiration of two years after written notice of such intention shall have been given to the company during the third fourth or fifth year after the passing of the bill.

. . .

" 14. A clause to be inserted in the bill excluding the undertaking property and rights of the company from its operation except that bye-laws may be made with the approval of the Home Secretary (after notice to the company) in regard only to blasting operations in the company's quarries for the protection of the public.

" 15. The company to be at liberty to continue working under the existing licences without restriction until the new licences above mentioned are granted.

. . .

" 17. The company shall be at liberty to make and use a tunnel fifteen feet wide and ten feet high under the area of land dividing their freehold property from the council's quarries at a point above the reservoir of the council to be agreed between the conservators and the council in accordance with plans to be approved by their respective surveyors and regulations to be made by the council for the protection of the public.

" 18. These provisions to be inserted in an agreement which shall contain an arbitration clause and to be executed in triplicate such agreement in case

of difference to be settled by a conveyancing counsel to be agreed upon between the company and the conservators or failing such agreement to be nominated by the President of the Incorporated Law Society."

These are, I think, all the provisions of the Act of 1924 to which it is necessary to refer for the present purpose.

Reserving for later consideration the position in regard to the Tank Quarry, as to which a special question arises, it appears to me to be reasonably plain that, if the heads of agreement in sched. 4 are to be looked on as taking effect by virtue of the Act, and not merely by virtue of a contract between the parties recorded in the Act but having no statutory force, the Act did authorise the development by quarrying operations of the quarryable area as defined in para. 1 of the heads of agreement, and the plan therein referred to, including as part of that area the leasehold interests to be purchased from the urban district council under para. 3. Paragraph 1, by limiting the company's rights of quarrying to that area, must, I should have thought, be taken by necessary implication to have authorised them to quarry within it.

This view is, to my mind, borne out by a consideration of the Act as a whole. Its object may be shortly described as being to preserve the amenities of the Malvern Hills, and, in particular, to preserve them from the inroads of quarrying. To that end, the conservators were given considerable powers, including the power of making bye-laws under s. 25, and were enabled to invoke the power of the Minister to make orders prohibiting quarrying operations altogether under s. 26 and s. 27. The company might have been subjected like other quarry owners in the Malvern Hills to these restrictive provisions. But, owing no doubt to their opposition to the bill, they were accorded special treatment. This was done by means of s. 54 and the heads of agreement in sched. 4. Section 54, expressed to be for the protection of the company, enacted that, unless otherwise agreed in writing between the company, the conservators and the Malvern council, the following provisions should have effect; and went on to provide that the heads of agreement in sched. 4 were thereby confirmed and made binding on the same three parties, and that the provisions of the Act should only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement. Turning to those heads of agreement, one finds that, by para. 1, they limit the company's rights of quarrying to the quarryable area defined in the plan, include in such area the quarries, the leasehold interest of the urban district council in which was to be purchased by the company under para. 3, and provide, by para. 2, that the company shall surrender the remaining area held by the company under the Gandolfi licences, which, apart from the Berington lease, which we were invited to ignore, may be taken as including the whole of the land over which the company had rights of quarrying as licensees outside the permitted area. Then, under para. 5 and para. 6, provision is made for the extension of the company's existing licences so far as they affect the areas which the company may work under para. 1 to June 24, 1960, and the grant of a licence expiring on the same date to work "the present council's quarries" (sc. "the council's present quarries") within the permitted area. Thus the company, in exchange for their exemption from the restrictive provisions of the Act, and the recognition of their right to work within the area shown on the plan, including as part of such area the leasehold interests to be acquired from the urban district council, and the extension of such rights until 1960, gave up their right to work the remainder of the land held by them under the Gandolfi licences, submitted to the grant to the conservators of an option to purchase their undertaking under para. 12 and para. 13, and furthermore submitted to the imposition

of a number of stipulations to be observed and performed by the company for the protection of the public and the preservation of amenities.

Viewing these arrangements as a whole, it appears to me that they did, according to the ordinary meaning of the word, authorise the company to work within the limits prescribed by para. 1. Apart from s. 54 and the heads of agreement, the company would have been exposed to the risk of their quarries being closed down by an order of the Minister under s. 26. They were, as I think, relieved of that risk and given security of tenure by s. 54 and the heads of agreement on the terms specified in the heads of agreement. That, in my view, amounted to authorisation of their quarrying operations within the reduced area allowed to them. In his most helpful judgment, MORRIS, L.J., referred to the dictionary definition of "to authorise" cited by TOMLIN, J., in *Evans* v. *E. Hulton & Co., Ltd.* (1), "to give formal approval to, to sanction, approve, countenance". Any one of these equivalents would, in my view, be apposite here.

The main arguments against the view that the development here in question was authorised by the Act of 1924 are two. The first is that the heads of agreement were merely contractual in their operation, so that the authorisation, if any, in this case did not satisfy the requirement in class xii of sched. 1 to the General Development Order of 1948, because the development if authorised at all was not authorised by "any local or private Act of Parliament". This argument, which commended itself to LORD DENNING, is founded on *R.* v. *Midland Ry. Co.* (2), but that appears to me to have been a very different case from this. In that case, an agreement concluded between two railway companies contained a provision for arbitration in manner provided by the Railway Companies Arbitration Act, 1859. Later a private Act of Parliament was passed, and this Act scheduled the agreement and provided that it should be "confirmed and made binding" on the parties thereto. Disputes having arisen, one of the companies concerned applied to the railway commissioners to determine the questions in dispute under the provisions of the Regulation of Railways Act, 1873. Objection was taken to the jurisdiction, and the objection succeeded, on the ground that the right to refer differences to arbitration was derived from the agreement itself; and that the difference was not "required or authorised to be referred to arbitration under the provisions of any general or special Act" within the meaning of the Act of 1873; and, consequently, that the railway commissioners had no jurisdiction to entertain the application. It is to be observed that, in that case, there was, by virtue of the agreement, a valid contractual arbitration clause before the private Act was ever passed. In the present case, no concluded agreement had been entered into before the passing of the Act. The heads of agreement were not binding on anyone until the Act had been passed, and their terms were plainly such that, when the Act was passed, they could have no contractual validity independently of the Act. If s. 54 and sched. 4 had not been included in the Act, it is reasonably plain that a contract in the terms of the heads of agreement in derogation of the terms of the Act could not have been validly made. I respectfully adopt the words of ROMER, J., in the unreported case of *Pyx Granite Co., Ltd.* v. *Malvern Hills Conservators* (3) where he said:

> "The parties only became bound by the heads of agreement by virtue of the express provision to that effect in s. 54 of the Act, and the heads of agreement were in this way made part of the Act."

For these reasons, I am of opinion that the argument that any authorisation

(1) (1924), 131 L.T. 534.
(2) (1887), 19 Q.B.D. 540.
(3) (C.A. June 24, 1925) unreported.

given was not given by the Act, but merely vested in contract, fails. I should add that I see nothing to displace this conclusion in the words " unless otherwise agreed in writing " which occur in s. 54. Those words, to my mind, merely indicate that the statutory protection afforded to the company may be relinquished by the company wholly or in part if the company, the conservators and the council so agree, and do not deprive such protection of its statutory character.

The other main argument against the view that the development here was " authorised " within class xii is to the effect that the Act did not authorise the company to do anything which they were not entitled to do before it was passed. Before the Act was passed, they were entitled to quarry on any lands owned by them or in which they had or might be able to obtain licences to quarry. After the Act was passed, their rights of quarrying were restricted in manner provided by s. 54 and sched. 4, but they were given no new rights save in so far as they acquired the leasehold interest of the council in the quarries mentioned in para. 3 of sched. 4, which were included in the permitted area. I think that this argument takes too narrow a view. When the bill which became the Act of 1924 was in the process of passing into law, prevention of quarrying was, so to speak, in the air. The legislature must be taken to have had under consideration the whole question of quarrying in relation to its effect on the amenities of the Malvern Hills, and the extent of the restrictions on the former which it would be reasonable and practicable to impose in the interests of the latter. The Act when it emerged could theoretically have stopped quarrying altogether, or subjected it to restrictions of any degree of severity as the legislature might think fit. In such circumstances, I think that it is right to regard an owner or licensee of quarry lands who is permitted by the Act to quarry without restriction part of his quarryable lands on condition that he gives up quarrying the rest, as authorised by the Act to quarry (albeit in right of his interest as owner or lessee) that part of his lands which the legislature permits him to quarry. Accordingly, I think that this argument fails also.

A subsidiary argument arises with respect to the Tank Quarry, the company's own freehold. The difficulty here is this. Section 5 defines " The area within the jurisdiction of the conservators for the purposes of this Act . . ." by saying that it shall comprise the lands, rights and interests described in sched. 1, sched. 2 and sched. 3 to the Act together with all lands common or waste over which the conservators " now have or may hereafter acquire rights and interests all of which are in this Act referred to as ' the Malvern Hills ' ". Schedule 1, " Property vested in the conservators ", and sched. 3, " Manorial rights authorised by this Act to be acquired by the conservators ", clearly have no reference to the Tank Quarry. But sched. 2, " Lands and quarries authorised by this Act to be acquired by the conservators ", in which one would expect to find the Tank Quarry, contains no mention of it, although it does include other land held by the company as licensees. Passing to sched. 4 it appears that the only references to the Tank Quarry in that schedule consist of the words in brackets " (outside their freehold property) " in para. 1, and of the provision in para. 17 enabling the compan[illegible]o make a tunnel under the area of land dividing their freehold quarry from the council's quarries. It is, accordingly, suggested that the Tank Quarry is not included in the area within the jurisdiction of the conservators as defined in s. 5 of the Act, and not included in the quarryable area defined in para. 1 of sched. 4, and, accordingly, that the Act cannot be held to have authorised quarrying on it.

This is a troublesome point, but I have come to the conclusion that the Tank Quarry must be taken to be included in the area of the conservators' jurisdiction and also to be included in the quarryable area as defined in para. 1 of sched. 4

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for the following reasons. Section 5 of the Act defines the area of the conservators' jurisdiction as comprising not merely the scheduled items but also "all lands common or waste over which the conservators now have or may hereafter acquire rights and interests". I construe these words as including "all lands, or common, or waste" and not "all common or waste lands". Paragraph 12 of the heads of agreement gives the conservators an option to purchase the company's undertaking as a going concern on the terms stated in that paragraph and in para. 13, this option being also referred to in s. 24 of the Act. Clearly, the company's undertaking must be taken as including the Tank Quarry. An option to purchase confers on the grantee of the option an interest in the property to which the option relates. Accordingly, in my opinion, the Tank Quarry is included in the area of the conservators' jurisdiction under s. 5, as falling with the expression "all lands . . . over which the conservators now have or may hereafter acquire rights and interests". With respect to para. 1 of sched. 4, I regard the expression "(outside their freehold property)" as of somewhat doubtful import, but as being well capable of meaning "apart from their freehold property" or "over and above their freehold property", so that the permitted area extends to their freehold property as well as to the other property shown on the plan as comprised in the quarryable area. I think this construction should be adopted, particularly in view of the apparent absurdity of omitting the Tank Quarry. This conclusion is, to my mind, aided by the fact that the option given to the conservators is an option to purchase the company's undertaking as a going concern. That surely imports an intention that the working of the Tank Quarry would in the meantime continue. The provisions in para. 17 of sched. 4 as to the making of the tunnel also appear to me to import the intention that the Tank Quarry should be worked. The fact that the option was never exercised does not, in my view, affect its bearing on the construction of the Act.

I should, perhaps, add a word about the unreported case already referred to. The decision of the Court of Appeal was to the effect that para. 14 of the heads of agreement was inoperative. The judgments are not altogether easy to follow, but, if and so far as they involve the conclusion that, notwithstanding s. 54, enacted as it was for the protection of the company, bye-laws made under s. 25 would bind the company, however inconsistent they might be with the quarrying within the permitted area conferred on the company without qualification by sched. 4, or that, notwithstanding s. 54, an order could be made by the Minister under s. 26 or s. 27 prohibiting further quarrying by the company within the permitted area, I cannot agree with them.

I find it unnecessary to discuss the agreement of Dec. 14, 1925, made in pursuance, or purported pursuance, of para. 18 of the heads of agreement. To my mind, the solution of the question of authorisation by the Act of 1924 is to be found in the Act itself, including as part of the Act the heads of agreement.

It follows from the views above expressed that, in my opinion, the difficult questions as to the propriety of the conditions attached to the permission given by the Minister under the Act of 1947, on the assumption that he was in a position to give any effective permission at all, and as to the appropriate remedy on the footing that the conditions were bad, which were fully and ably argued before your Lordships, do not arise, and I express no opinion about them one way or the other.

For these reasons, I would allow this appeal. *Appeal allowed.*

Solicitors: *Stephenson, Harwood & Tatham; Solicitor, Ministry of Housing and Local Government*; *Sharpe, Pritchard & Co.*, for *W. R. Scurfield*, Worcester.

G.F.L.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND PHILLIMORE, J.)

June 22, 1959

CASSIDY *v.* CASSIDY

Husband and Wife—Separation—Maintenance—Causing grievous bodily harm—"Conviction"—Conditional discharge—Offences against the Person Act, 1861 (24 & 25 *Vict.*, *c.* 100), *s.* 20, *s.* 43—*Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict.*, *c.* 39), *s.* 4—*Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 12 (1).

A husband, charged under s. 20 of the Offences against the Person Act, 1861, with causing grievous bodily harm to his wife, was given by a court of summary jurisdiction a conditional discharge and bound over for twelve months. By s. 12 (1) of the Criminal Justice Act, 1948, that conviction was to be "deemed not to be a conviction for any purpose other than the purposes of . . . subsequent proceedings" under the previous provisions of that Act. The wife applied under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, for separation and maintenance orders on the ground that her husband had been convicted of an aggravated assault on her contrary to s. 43 of the Act of 1861.

HELD: a conviction under s. 20 of the Act of 1861 of inflicting grievous bodily harm on a woman was a conviction of an aggravated assault under s. 43 of the Act, even though the punishment imposed was one which could be imposed for a common assault, but the wife was not entitled to the order that she sought because, by reason of s. 12 (1) of the Criminal Justice Act, 1948, the conviction did not rank as a conviction for the purposes of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895.

APPEAL by the wife from an order by the justices of Newcastle-upon-Tyne dismissing her complaint under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895.

The parties were married on Aug. 3, 1956. On Jan. 25, 1959, the husband pleaded Guilty to having assaulted his wife, causing her grievous bodily harm, contrary to s. 20 of the Offences against the Person Act, 1861. On Feb. 2, 1959, the justices conditionally discharged the husband, the condition being that he should commit no further offence within the next twelve months. On Apr. 2, 1959, the wife applied under s. 4 of the Act of 1895 for an order that she should be no longer bound to cohabit with the husband and for maintenance, on the ground that he had been convicted of an aggravated assault on her contrary to s. 43 of the Act of 1861. A different panel of justices heard the case and dismissed the application stating that it was not within s. 4 of the Act of 1895 on the ground that the offence of Jan. 25 was not an aggravated assault within s. 43 and that the offence could not be regarded for present purposes in view of s. 12 (1) of the Criminal Justice Act, 1948.

J. R. Johnson for the wife.
Orde for the husband.

LORD MERRIMAN, P.: This is a wife's appeal from the dismissal by the magistrates for the city and county of Newcastle-upon-Tyne on Apr. 2, 1959, of her complaint for an order under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895. The particular ground on which she complained for an order was that her husband had been convicted summarily of an aggravated assault on her within the meaning of s. 43 of the Offences against the Person Act, 1861.

The magistrates found that that section was not complied with for two reasons, first that the assault (I will call it an "assault" without prejudice) committed on the wife did not come within s. 43 because the magistrates who

heard the assault charge against the husband chose only to impose a conditional discharge, and, secondly that it was a conviction which could not be regarded for the purposes of s. 4 by reason of the provisions of s. 12 of the Criminal Justice Act, 1948. Those two points are quite distinct. I think that they were completely wrong about the first and that they were right about the second, and I should say shortly why I take that view. Either reason, of course, is sufficient to oblige us to dismiss this appeal.

The material parts of s. 43 are as follows:

> "When any person shall be charged before two justices of the peace with an assault . . . upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions hereinbefore contained as to common assaults . . . may proceed to hear and determine the same in a summary way, and, if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned . . . for any period not exceeding six months, or to pay a fine not exceeding (together with costs) the sum of £20 . . ."

In fact, this man was charged with the more serious offence of an assault occasioning grievous bodily harm. It is very unfortunate that, no exhibits having been sent up, we have not even seen, and do not know whether the magistrates saw, the certificate of conviction. The matter stands thus. The wife said in evidence that her husband had been convicted, on his own confession, of this assault occasioning grievous bodily harm. We do not know the precise detail of it, and I do not know that that matters, because, if a certificate to that effect had been produced that, I think, would have been all that s. 4 demands. In my opinion s. 4 does not demand a re-trial of the circumstances in which the particular assault was committed. All that is required is that the man should have been convicted of it.

I ought to say in passing that it has been the law for a great number of years, ever since the decision of *R.* v. *Taylor* (1), that it is open to a court on indictment for grievous bodily harm to find a common assault. I am only going to read the last sentence of the judgment, which is as follows:

> "On an indictment for a misdemeanour the jury may find the prisoner guilty of any lesser misdemeanour that is necessarily included in the offence as charged."

On that basis it was held that an assault was necessarily included in the offence charged, and I should say without any hesitation so far as that is concerned that an assault occasioning grievous bodily harm contains, as the lesser offence, an aggravated assault.

The magistrates have declined to act on that basis. The conviction was admitted and the whole case proceeded, as this appeal has proceeded, on the footing that the justices had before them evidence of what otherwise should have been proved. The magistrates, having heard the husband's confession, for he was convicted on his own confession of the offence of assault occasioning grievous bodily harm, had before them material from which, so it is suggested, it should have been inferred as the almost inevitable inference, that he had at least pleaded guilty to something which could be described as an aggravated assault. The law has, however, been changed in one respect. This offence has been made one which can, with the consent of the accused person, be dealt with summarily instead of

(1) (1869), 33 J.P. 358; L.R. 1 C.C.R. 194.

the defendant having to go to quarter sessions or assizes and be tried on indictment, thus coming within the next sentence of s. 4 of the Act of 1895, i.e.,

> "... [Any married woman] whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than £5 or to a term of imprisonment exceeding two months ..."

It is common ground, though it is not proved as it should have been proved, that the husband did consent that the charge against him of an assault occasioning grievous bodily harm should be dealt with summarily on his plea of guilty of that offence. Accordingly, it is said that in accepting that plea the magistrates must at least have found him guilty of an aggravated assault, on the principle that the greater includes the less. They only imposed, however, the penalty, if it can be called a penalty, of a conditional discharge. It is necessary, therefore, to refer to s. 7 (1) of the Criminal Justice Act, 1948:

> " Where a court by or before which a person is convicted of an offence ... is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment ... the court may make an order discharging him absolutely, or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified therein."

Acting on that section, the magistrates gave him a conditional discharge, with the period, as I understand it, of twelve months.

Although the magistrates appear to have taken the view that there is the right to call an assault an aggravated assault and to deal with it accordingly by virtue of s. 43—i.e., "of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions hereinbefore contained as to common assaults"—yet they imposed a penalty which could perfectly well have been imposed in respect of a common assault, thereby, so it is suggested, negativing the condition precedent to regarding it as an aggravated assault.

That would have been a very interesting argument if it had been advanced for the first time, but unfortunately it was advanced in two cases to which we have been referred. One is *Woods* v. *Woods* (1) and the other is *Powell* v. *Powell* (2) which is precisely the opposite effect, for in *Woods* v. *Woods* (1) it was decided that:

> " If a husband has been convicted of an aggravated assault the magistrates may grant a judicial separation, even though they do not fine or imprison him."

Put the other way round, s. 4 of the Act of 1895 applies because of the conviction for an aggravated assault, even though the penalty actually imposed was such as could have been imposed for a simple assault, and BUTT, J., said this:

> " It seems to me that the reason of the thing is this. The man was found guilty of an assault and the magistrates thought that the penalties under s. 42 would by themselves be inadequate. But inasmuch as they were going further to order a weekly payment, and also to make an order about cohabitation and the custody of children, they thought they need only impose a nominal fine. The recital in the order seems to me quite sufficient, and the appeal therefore will be dismissed."

(1) (1884), 50 J.P. 199; 10 P.D. 172.
(2) (1889), 53 J.P. 519; 14 P.D. 177.

In this case, not having the order before us, we have not got the benefit of any such recital, but it certainly seems to me to follow from the decision of CLEASBY, B., in *Holden* v. *King* (1), that it is open to the subsequent tribunal (in that case it was a judge of the High Court) to say for itself whether the conviction was or was not of an aggravated assault, and at any rate that was the view adopted by CLEASBY, B., in that case. So, here, I think that we are in a position to say, for the reasons which I have already given, that the offence of an assault occasioning grievous bodily harm ipso facto is an aggravated assault.

That was followed by BUTT, J., in *Powell* v. *Powell* (2), and I need only read one sentence from the argument and the learned judge's reply to it. "Finally", the argument ran, "the order for separation was wrong, because the justices only inflicted the penalty for a common assault under s. 42". To this BUTT, J., replied "That is answered by *Woods* v. *Woods* (3)" and in a later decision still, *Lewin* v. *Lewin* (4), JEUNE, J., said in effect that he was bound by the conviction. As a matter of fact he also held himself to be bound by *Woods* v. *Woods* (3) and *Powell* v. *Powell* (2). In other words, the mere fact that the magistrates chose not to impose a higher penalty than they could perfectly well have imposed for a common assault is immaterial if the thing to which the accused pleaded guilty was, and ought to be held to be, an aggravated assault. If that were the only ground of appeal I should feel, speaking for myself, no hesitation in saying that that was not a ground for dismissing the wife's complaint; but, as I have already indicated, it is not the only ground of appeal.

On the contrary, we are confronted by another section of the Criminal Justice Act, 1948, with which I will now proceed to deal. That is s. 12 (1), which reads as follows:

> "... a conviction of an offence for which an order is made under this Part of this Act, discharging [the offender] absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act."

Those words "shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings" are very clear and definite. The note in ARCHBOLD CRIMINAL PLEADING, EVIDENCE & PRACTICE (34th Edn.), p. 267, para. 728, to that section reads as follows:—"Section 12 absolves an offender from legal consequences which would otherwise flow from a conviction". I pause there, without reading on for a moment, to say that the making a complaint under s. 4 of the Act of 1895 is in terms "a legal consequence which would otherwise flow from a conviction". I need not read the words of the section again. It is plain that the complaint is based on a conviction under s. 43 of the Offences against the Person Act, 1861, by a court of summary jurisdiction for an aggravated assault. Those words "absolves the offender from legal consequences which would otherwise flow from a conviction" are taken wholesale from *R.* v. *Harris* (5), a decision of the Court of Criminal Appeal to which we have been referred. The judgment was given by HUMPHREYS, J. Quoting from MORRISON AND HUGHES ON THE CRIMINAL JUSTICE ACT, 1948, p. 35, where, in a note to s. 12, it is said "the section absolves the offender from legal consequences

(1) (1876), 41 J.P. 25.
(2) (1889), 53 J.P. 519; 14 P.D. 177.
(3) (1884), 50 J.P. 199; 10 P.D. 172.
(4) 55 J.P. 296; [1891] P. 254.
(5) 114 J.P. 535; [1950] 2 All E.R. 816; [1951] 1 K.B. 107.

which otherwise would flow from the conviction", HUMPHREYS, J., said: "That is exactly what it does do".

If that is so, it follows that this wife cannot produce to the magistrates' court dealing with her complaint a conviction for an aggravated assault or an assault occasioning grievous bodily harm, because the document which theoretically she produces is one in which the husband is given a conditional discharge, and, therefore, it is deemed by s. 12 of the Act of 1948 not to be a conviction. That being so, it seems to me that we have no option but to support the magistrates' decision on this ground, and to dismiss the appeal.

PHILLIMORE, J.: I agree. So far as the second point is concerned it seems to me quite clear from the wording of s. 7 (1) of the Criminal Justice Act, 1948, that the intention of Parliament was to provide that where the court thinks it inexpedient to inflict punishment it should be able to discharge a man conditionally on his committing no further offence within twelve months, and with the benefit that he should not be stigmatised as having been convicted.

That was the course which the justices took in this case. Having convicted this husband, on his own confession, of an assault occasioning grievous bodily harm, they discharged him conditionally. It would be strange in those circumtances if he was exposed to the legal consequences which would flow from a conviction, namely, the consequence that his wife could obtain an order that she might live separate and apart from him and that he should be bound to maintain her. It seems to me that such a position would fly directly in the face of the intention of the Act of 1948. I would accordingly dismiss this appeal.

On the other point I would add a few words out of deference to the argument of counsel for the wife and to the fact that we are differing from the justices. The justices, as I understand it, took the view that inasmuch as the conviction (assuming it was a conviction) of the husband was for an assault occasioning grievous bodily harm, that was a conviction for an offence totally different from the offence of committing an aggravated assault. That is referred to in s. 43 of the Act of 1861. It is quite clear from the authorities to which we were referred, *Crocker* v. *Raymond* (1), and *Holden* v. *King* (2), that s. 43 does not create an offence separate from the offence of common assault created by s. 42. It merely enables the court, where it has found a person guilty of common assault, if it thinks that there were circumstances which were of an aggravating nature, to treat it accordingly and to inflict a heavier penalty. As the court found in *Crocker* v. *Raymond* (1) the section of the statute did not make two specific offences, but simply gave power to the justices, if they thought an assault to be of an aggravated character, to inflict adequate punishment for it.

As my Lord has already pointed out, the authority of *Woods* v. *Woods* (3) and all the cases in which it has been followed, make it clear that even if the justices do not choose to inflict a heavier penalty than they were able to do for a common assault, nevertheless, if they choose to describe it as an aggravated assault the conviction is sufficient for the purposes of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895.

The husband was convicted on his own confession of causing grievous bodily harm under s. 20 of the Offences against the Person Act, 1861, and we have the clear authority of *R.* v. *Taylor* (4), to show that where a man is convicted under that section it is open to a court to convict him instead, if it thinks the matter

(1) (1886), 3 T.L.R. 181.
(2) (1876), 41 J.P. 25.
(3) (1884), 50 J.P. 199; 10 P.D. 172.
(4) (1869), 33 J.P. 358; L.R. 1 C.C.R 194.

not of any serious character, of a common assault. Well, here the justices did not take that course. They convicted of the full offence under s. 20. It must follow that their conviction was of an assault more serious than an ordinary common assault, and must at least have amounted to an aggravated assault within the meaning of s. 43, and, if that point had stood alone, I should have felt unable to agree with the decision of the justices.

As it is, however, for the reasons which I have ventured to give to supplement those already given by my Lord in regard to the question whether this was a conviction, this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Robinson & Bradley* for *Smirk, Thompson & Craigs*, Newcastle-upon-Tyne; *Gibson & Weldon*, for *L. Mulcahy*, Gateshead.

G.F.L.B.

QUEEN'S BENCH DIVISION

(Lord Parker, C.J., Slade and Davies, JJ.)

July 7, 1959

Re SHUTER

Extradition—Fugitive offender—Evidence of offences to be given by expert in local law—Inherent jurisdiction of Divisional Court to remit case for further evidence—Fugitive Offenders Act, 1881 (44 & 45 *Vict.*, c. 69), *s.* 9.

Where the extradition of an alleged fugitive offender under the Fugitive Offenders Act, 1881, is sought, evidence that the offences come within s. 9 of the Act must be given by an expert on the local law. This evidence may be given either in the form of a deposition which comes to England with the warrant or by oral evidence before the magistrate in England.

The applicant appeared before the Chief Metropolitan Magistrate under a warrant of arrest issued in Kenya in respect of eleven offences alleged to have been committed there and was detained in prison pursuant to an order of committal. The evidence before the magistrate raised the presumption that the applicant had committed the offences, but the only evidence before him with regard to the manner in which the offences were punishable in Kenya was contained in an order of the senior resident magistrate at Nairobi for the issue of the warrant of arrest. The document set out the offences charged, each being followed by the words "rendering the offender liable to" [three years in regard to each of the nine offences]. By s. 29 of the Act of 1881 "judicial documents stating facts" may be received in evidence. On an application by the applicant for habeas corpus,

Held: (i) what was set out in the order of the magistrate at Nairobi was a statement of law and not of fact, and, as it had not been shown by any proper evidence that the offences were punishable in Kenya by "imprisonment with hard labour for a term of twelve months or more, or by any greater punishment," there was no evidence before the Chief Magistrate that the alleged offences came within s. 9 of the Act of 1881; (ii) the Divisional Court had inherent jurisdiction in a proper case to remit the matter to the Chief Magistrate, and the present case would be remitted for him to receive evidence with regard to the local law.

Motion for habeas corpus.

The applicant, Victor Charles Shuter, was brought before the Chief Magistrate at the Metropolitan Magistrates' Court at Bow Street on June 17, 1959, under a warrant of arrest issued by the government of Kenya and indorsed in the United Kingdom under the Fugitive Offenders Act, 1881, s. 3. The warrant was in respect of eleven offences (forgery, uttering false documents, theft, and obtaining cash and goods by false pretences) alleged to have been committed by the

applicant in Kenya. The chief magistrate made an order, under s. 5 of the Act of 1881, committing the applicant to Brixton Prison to await his return to Kenya. Counsel for the applicant now moved for a writ of habeas corpus on the ground that his detention was unlawful in the absence of evidence before the Chief Magistrate that the Act of 1881 applied to the offences with which he was charged, there being no evidence that, under the law of Kenya, any of the offences was punishable by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment, within s. 9 of the Act. In the alternative, the applicant applied for relief under s. 10 of the Act.

Butter for the applicant.

J. C. Mathew for the government of Kenya.

Buzzard for the governor of Brixton Prison and the Home Secretary.

LORD PARKER, C.J.: In these proceedings counsel moves for a writ of habeas corpus on behalf of one Victor Charles Shuter now detained in Brixton Prison pursuant to an order of committal made by SIR LAURENCE DUNNE, the chief metropolitan magistrate, under the Fugitive Offenders Act, 1881. There is, in the alternative, an application for relief under s. 10 of that Act.

The applicant is accused of having committed a number of offences in Kenya at the end of 1958 and the beginning of 1959. There are some eleven charges, consisting of forgery, uttering false documents, theft, obtaining cash and goods by false pretences and obtaining credit. There is a warrant from Kenya, duly authenticated, for his apprehension and return to Kenya, and there is also no doubt that the depositions from Kenya, which were admissible as evidence before the chief magistrate, raised a strong or probable presumption that the applicant had committed the offences mentioned in the warrant so as to justify the chief magistrate in committing him to prison to await his return, under s. 5 of the Act of 1881. It is said, however, that there was no evidence before the chief magistrate that the offences with which the applicant was charged were offences to which the Act applied.

By s. 9 of the Act it is provided:

> "This Part of this Act shall apply to the following offences, namely, to treason and piracy, and to every offence, whether called felony, misdemeanour, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's Dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment; and for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour."

The only evidence before the Chief Magistrate of the law of Kenya—what I may refer to as the local law—in regard to the punishment for these offences, if it be evidence at all, is to be found in a document which was attached with the depositions to the warrant, and which was an order by the senior resident magistrate in Nairobi ordering that a warrant of arrest be issued. It reads in this way:

"INQUIRY UNDER THE FUGITIVE OFFENDERS ACT, 1881

Regina *v.* Victor Charles Shuter

ORDER

"I order that a warrant of arrest be issued for the apprehension of Victor Charles Shuter formerly an officer of the Kenya Prisons Service on the eleven counts in the charge sheet hereto attached marked 'A'."

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Eng Rep.

Then then follows a reference to the eleven counts:

"Count 1: Forgery, being a felony rendering the offender liable to imprisonment for three years."

Thereafter the remaining ten counts are set out together with the period of imprisonment for which the offender is liable in respect of each count. It is to be observed that, in nine cases out of the eleven, the liability to imprisonment was to imprisonment for more than a year; and, secondly, that in no case is there any reference to imprisonment with hard labour. I have very grave doubts, however, whether that document which I have read is any evidence of the punishment for which the offender would be liable in Kenya. Whether it is any such evidence depends on the construction of s. 29 of the Fugitive Offenders Act, 1881. The relevant part, for this purpose, of that section is in these words:

> "Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act."

No doubt the order to which I have referred is a judicial document, but, so far as the author, the senior resident magistrate at Nairobi, is concerned, what is set out in the order in regard to the liability to punishment can hardly be said to be a setting out of facts by him; he was setting out the law. Accordingly, I have very grave doubts whether, under s. 29 of the Act of 1881, that document was admissible before the chief magistrate as evidence of the law of Kenya in regard to punishment. Quite apart from that, however, there is nothing in the document to indicate that the respective periods of imprisonment there referred to are periods of imprisonment with hard labour or periods of imprisonment of such a character as to come within the last few lines of s. 9:

> "... for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour."

It is true that, on one reading of that section, it could be said that, as in nine out of the eleven offences the punishment set out in the document is more than twelve months, they are covered by the words in the section, "or any greater punishment". I feel great difficulty in any such construction. It seems to me that the more natural way to read the section is that the words "or more" are referring to a sentence of imprisonment of more than twelve months accompanied by hard labour.

There is no doubt that this is a technical objection. It is most unlikely, looked at as a matter of common sense, that the senior resident magistrate in Nairobi would set his hand to such a document as this order, headed, as it is, under the Fugitive Offenders Act, 1881, without verifying that the offences were offences within the Act. It would be, as a matter of common sense, still more extraordinary if these offences of forgery, false pretences and the like were not offences to which the Act applied at all; but, be that as it may, the matter must be looked at strictly.

In *R.* v. *Brixton Prison* (*Governor*), *Ex p. Percival* (1), a case not unlike the present case, LORD ALVERSTONE, C.J., said:

> "In my opinion every person who comes and asks for an order for the delivery up of a fugitive offender must be prepared with evidence that that condition of the statute has been fulfilled. That is a very important matter,

(1) 71 J.P. 148; [1907] 1 K.B. 696.

and having regard to the fact that we are dealing with the criminal law, we must apply the general principles of the criminal law, and the prosecutor must make out his case. We are also dealing with a branch of the criminal law which affects the liberty of the subject, and that condition should under ordinary circumstances be clearly fulfilled."

That view was expressed directly in regard to the calling of evidence as to the local law. I incline to the view that there was no evidence at all before the chief magistrate as to the law in regard to punishment, and, in any event, no evidence that the offences came within s. 9 in regard to hard labour. But whether I am right or wrong, I feel very strongly that in these cases there should be a settled practice, and that in every case an expert on the local law should give evidence either in the form of a deposition which comes over with the warrant or by giving evidence before the chief magistrate in this country. So far as the present case is concerned, I think that the proper course is to remit the matter to the chief magistrate in order that it may be dealt with in accordance with what I hope will become the settled practice.

Counsel for the applicant, to whom the court is greatly indebted for his argument, contended that there was no jurisdiction in this court to remit the matter. He pointed out, what is undoubtedly true, that, on the view which I have expressed, the chief magistrate had no jurisdiction to commit the applicant, and that the applicant was at this moment wrongly detained. That I fully appreciate, but it seems to me that in a proper case—and I think that this is a proper case—the court must have inherent jurisdiction to take that course. Indeed, in *R.* v. *Brixton Prison (Governor), Ex p. Percival* (1), LORD ALVERSTONE, C.J., and DARLING, J., both took the view that there was jurisdiction to send the case back. LORD ALVERSTONE, C.J., began his judgment by saying:

"Having regard to the serious nature of the offence if proved, I have been much pressed with doubt as to whether we ought not to send the case back in order that the evidence which is suggested as being wanted should be supplied."

DARLING, J., said:

"What I have a doubt about in this case is whether we are justified in deciding it without doing that which I am quite clear we could do, viz., either send it back to the magistrate and point out to him the defect in the proceedings as they at present come before us, and allow him to have the prosecution reopened and evidence given, or else require for our own information an affidavit showing what the law of Victoria applicable to this case is."

Both LORD ALVERSTONE, C.J., and DARLING, J., clearly took the view that it was possible to remit the case or, alternatively, to receive further evidence in this court. It is true that in that case they did not do so, but that was for particular reasons, one of which was that the alleged offence had occurred some five or six years earlier, and other matters, such as that the prisoner had endeavoured to make reparation and was now carrying on an honest life. Thus in all the circumstances of that case they did not exercise what they undoubtedly considered to be their inherent powers to remit.

At one time I was inclined to the view that the matter might be most conveniently dealt with by invoking the Evidence (Colonial Statutes) Act, 1907, which provides, by s. 1 (1), that copies of Acts, ordinances, and statutes passed by the legislature of any British possession, if purporting to be printed by the government printer,

(1) 71 J.P. 148; [1907] 1 K.B. 696.

" . . . shall be received in evidence by all courts of justice in the United Kingdom without any proof being given that the copies were so printed."

Following the power in that section, it seemed that it might be a convenient course if this court received, and counsel tendered on behalf of the Kenya government, the printer's copies of the relevant code and ordinances dealing with punishment for these offences; but, as counsel for the governor of Brixton Prison quite rightly pointed out, no one except an expert can be sure that the statute or other document of which the printer's copy is tendered is the latest version of the local law. For all one knows, it may have been recently amended, and, as I am very anxious that there should be a settled practice in the matter, and a safe practice, it seems to me that in this and all cases there should be evidence from an expert on the local law. Accordingly, in this case I would remit the matter to the Chief Magistrate for him to receive evidence as to that local law.

As regards the application for relief under s. 10 of the Act of 1881, it is sought to make out the case that the application for the return of the applicant was not being made in good faith in the interests of justice. That is one of the grounds on which the court has a discretion to discharge the fugitive either absolutely or on bail under s. 10 of the Act. The case, quite shortly, sought to be made is that the applicant had, before leaving Kenya, apparently sworn an affidavit and submitted it to the Kenya government, making allegations of grave irregularities in camps where Mau Mau prisoners were detained. In effect, he says that the Attorney-General of Kenya and the deputy public prosecutor, knowing full well that he had committed the offences with which he is now charged, allowed him to leave Kenya, and that it is only as the result of an inquiry and a report made by Mr. Jack (the deputy public prosecutor), who found that all, except a very few minor allegations made by Mr. Shuter, were completely unfounded, that the Kenya government are now seeking to have him returned to Kenya in order that he should be punished for making those allegations or, alternatively, that he should be detained so that he should not make further allegations. The court has had the advantage of reading affidavits from Mr. Jack and from the Attorney-General, and it is enough, in my judgment, to say that, on a reading of the affidavit evidence here as a whole, the case sought to be made under s. 10 is not made out and should be refused.

SLADE, J.: I agree. I desire to add only, in relation to s. 9 of the Fugitive Offenders Act, 1881, that there was no evidence of any kind whatsoever before the chief magistrate to bring the offences within s. 9, even assuming that the order signed by the senior resident magistrate at Nairobi was admissible in evidence. The argument, as I understand it, is this: that though the evidence in regard to the offences contains no reference to hard labour, which originally was a condition precedent for bringing the offences within s. 9, unless they came under the words which meant at that time penal servitude or something other than imprisonment, and though one will not get much assistance from the Kenya Penal Code (at which, I understand, the chief magistrate looked), yet if one were further informed that there was an ordinance, the Criminal Justice Ordinance, 1957 (No. 26 of 1957), and looked at that, one would see that hard labour had been abolished in Kenya. One would see, further, that imprisonment could take the form either of rigorous imprisonment or some other form of imprisonment which falls within the words in s. 9 of the Act of 1881:

" . . . and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour."

That ordinance was not before the chief magistrate, and that again emphasises the anxiety which counsel for the governor of Brixton Prison expressed that the mere production of an Act of Parliament or of a penal code does not necessarily mean that all of it is still extant or remains unaltered, and, indeed, we know that the Kenya Penal Code which was before the chief magistrate had been altered by the Criminal Justice Ordinance, 1957 (No. 26 of 1957). That is sufficient to send this case back to the Chief Magistrate.

With regard to the construction of s. 9, the point does not now arise, and I say no more, but I find it difficult to believe that imprisonment for life is not a greater punishment than twelve months' hard labour.

DAVIES, J.: I entirely agree with the judgments of my Lords.

Case remitted. Bail allowed.

Solicitors: *Official Solicitor*; *Charles Russell & Co.*; *Director of Public Prosecutions.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J.)

July 8, 10, 1959

CHING GARAGE, LTD. *v.* CHINGFORD CORPORATION

Highway—Refuge—Proposal by highway authority to erect refuge without compensation on access from garage to carriageway—Erection on soil of highway, but not on carriageway—Public Health Act, 1875 (38 & 39 *Vict*, *c.* 55), *s.* 149—*Public Health Acts Amendment Act*, 1907 (7 *Edw.* 7, *c.* 53), *s.* 18 (*c*)—*Road Traffic Act*, 1956 (4 & 5 *Eliz.* 2, *c.* 67), *s.* 45 (1).

The plaintiffs owned a corner plot at the intersection of two roads, the S. road and the V. road. Their land lay to the south of the V. road (which ran approximately east and west) and to the west of the S. road (which ran approximately north and south). Both highways were repairable by the inhabitants at large. In 1932 the plaintiffs or their predecessors, with planning permission, had erected a garage on the land, and access to the two highways had been constructed at the same time under the Public Health Acts Amendment Act, 1907, s. 18. One access was a forty foot access to the V. road, which crossed a verge (which had been dedicated in 1928 as part of the highway) and gave access to the carriageway of the V. road. The defendants, who were the highway authority, proposed to erect a street refuge in the middle of the forty foot access to the V. road, where the access emerged on the carriageway of the highway, contending that they had power to do this under the Road Traffic Act, 1956, s. 45, without paying compensation, or under the Public Health Act, 1875, s. 149. By s. 45 (1) of the Act of 1956, a highway authority has power to construct works " in the carriageway . . . for providing places of refuge " for pedestrians crossing the road. By s. 149 of the Act of 1875 the urban authority shall cause from time to time highways repairable by the inhabitants at large to be " altered ".

HELD: the refuge would not be in the carriageway of the V. road although it would be in the highway, and so it was not authorised by the Road Traffic Act, 1956, s. 45; even if the Public Health Act, 1875, s. 149, applied to refuges at all, that section did not cover the construction of the proposed refuge in the circumstances of the present case; and, accordingly, the defendants were not empowered to construct the refuge under those enactments.

Per CURIAM: paragraph (c) of s. 18 of the Public Health Acts Amendment Act, 1907, did not have the consequence that after the construction of works of access the access was deemed to be a carriageway of the highway.

ACTION by the plaintiffs, Ching Garage, Ltd., claiming against the defendants, Chingford Corporation, as highway authority, a declaration that the defendants were not entitled to obstruct, interfere with, or otherwise limit, the use of the means of access enjoyed with the plaintiffs' premises, known as the Ching Garage, at the junction of Sewardstone Road and Lea Valley Road, in the borough of Chingford, and an injunction restraining the defendants from causing any such obstruction, interference or limitation by themselves or through their agents or servants. The plaintiffs also claimed damages.

The facts, which were not in dispute, were as follows. The plaintiffs were the owners of land on which were premises known as the Ching Garage. The garage was situated at the junction of Sewardstone Road and Lea Valley Road, Chingford, Essex. Sewardstone Road ran roughly from north to south and Lea Valley Road, from east to west; the northerly and easterly boundaries of the garage lay respectively along Lea Valley Road and Sewardstone Road. Both roads were repairable by the inhabitants at large, and the defendants were the highway authority for both roads. The verge between the plaintiffs' land and the carriageway of Sewardstone Road was formerly in the control of the conservators of Epping Forest, but in 1928 the verge was dedicated by the conservators as part of the highway. No kerbed or paved footway on the frontage to Sewardstone Road had ever existed. The Lea Valley Road had had a kerbed and paved footway since before 1932 and was kerbed west of a point shown on a plan. Before the erection of the garage, the plaintiffs' land was occupied agriculturally and there were two field gates giving access across the verge to Sewardstone Road, and a field gate giving access to Lea Valley Road. The garage was erected by the plaintiffs, or their predecessors, in 1932 under permission granted under the Town and Country Planning Act, 1925. Means of access was constructed for the plaintiffs' predecessors pursuant to permission duly given on May 2, 1932, under the Public Health Acts Amendment Act, 1907, s. 18 These works were ultimately carried out and certified as having been properly carried out by the surveyor of the highway authority. The access thus created was an access on to the carriageway of Sewardstone Road and an access on to the carriageway at the junction of Sewardstone and Lea Valley Roads. The latter access (the Lea Valley access) went first on to that part of the highway dedicated by the conservators of Epping Forest, and then went, over a frontage of about forty feet, on to the carriageway at the road junction. The defendants now proposed to erect a street refuge in the middle of the forty foot Lea Valley access, where the access emerged on to the carriageway. The kerb was set down into the road with inset granite blocks because of the opening from the garage on to the carriageway. The defendants contended that, by reason of certain statutory powers, in particular, the Public Health Act, 1875, s. 149, and the Road Traffic Act, 1930, s. 55, they were entitled to erect the proposed street refuge without paying compensation. During the course of the trial it appeared that s. 55 of the Road Traffic Act, 1930, had been amended by the Road Traffic Act, 1956, so as to make s. 55 of the Act of 1930 inapplicable to the present case: accordingly, the defendants relied on s. 45 of the Road Traffic Act, 1956.

Squibb, Q.C., and *Kerrigan* for the plaintiffs.

Frank and *Seward* for the defendants, the highway authority.

Cur. adv. vult.

July 10. **LORD PARKER, C.J.,** read the following judgment. This is an action brought by the plaintiffs, Ching Garage, Ltd., against the defendants, the Mayor, Aldermen and Burgesses of the Borough of Chingford, for a declaration

and for an injunction in regard to what is said to be an obstruction which the defendants propose to erect in the means of access from the garage to the highway.

[His Lordship then shortly stated the agreed facts, and continued:] I do not know whether the proposed action by the defendants will really damage the plaintiffs, and I am not concerned with that. It may be that they will suffer some damage. At any rate, the plaintiffs object to it being done without payment of compensation. There seems little doubt that if certain machinery had been exercised and the matter had been approached in a certain way, there was power to do what the defendants propose to do, but always subject to the payment of compensation. The defendants, on the other hand, say that they are perfectly entitled to do what they propose to do, and to do it without payment of compensation.

The starting point in this matter must be the common law position, that everyone who owns and occupies land adjoining a highway has a right of access to any part of the highway. It is best stated by Lord Atkin in *Marshall* v. *Blackpool Corpn.* (1) where he sets out what he conceives to be the legal position in these words:

> "The owner of land adjoining a highway has a right of access to the highway from any part of his premises. This is so whether he or his predecessors originally dedicated the highway or part of it and whether he is entitled to the whole or some interest in the ground subjacent to the highway or not. The rights of the public to pass along the highway are subject to this right of access, just as the right of access is subject to the rights of the public, and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway."

Later he says:

> "As was pointed out by the Lord Chief Justice, it would be remarkable to find this well established right of an adjoining owner taken away and without compensation, especially in a local Act, unless there were very plain words to that effect."

On the other hand, it is undoubtedly true that many statutory powers given to local authorities in these matters clearly contemplate interference with private rights of access, and in those circumstances, must be treated as giving powers of interference.

The principle is set out at p. 127 of Pratt & Mackenzie's Law of Highways, (19th Edn.), where it says:

> "Where there is a statutory authority to erect obstructions in the highway such as lamp posts, electricity poles or bus shelters, the adjoining owner has no right to restrain the exercise of the statutory authority to obstruct the highway where they bona fide think it necessary, and if by the terms of the statute and the nature of the obstruction the legislature must be taken to have contemplated the probability if not the certainty that the obstructions erected under the statute would interfere with rights of adjacent property owners, then the statute impliedly authorises interference with those rights in the reasonable exercise of the statutory powers, notwithstanding the absence of any provision for compensation."

It therefore becomes necessary—and this is the sole point in this case—to see whether, by statute, the defendants have the powers which they claim that they have, to erect this obstruction in the access which was constructed to plans approved by them in 1932.

(1) 98 J.P. 376; [1934] All E.R. Rep. 437; [1935] A.C. 16.

The defence sets out a great number of statutory provisions, but only three have been relied on in this court. The first that is relied on is s. 149 of the Public Health Act, 1875; secondly, the Road Traffic Act, 1930, s. 55; and thirdly, the Road Traffic Act, 1956, s. 45.

I propose to deal, in the first instance, with s. 55 of the Road Traffic Act, 1930. On being referred to that section as set out in PRATT & MACKENZIE (19th Edn.) it seemed to me to give the defendants power to do what they now propose to do. Counsel for the defendants naturally relied on the following words in s. 55:

> "... a highway authority [as were the defendants] as respects any road vested in them may, for the purpose of ... making the crossing of any road less dangerous to foot passengers, erect ... places of refuge in the road ... "

It is true that, in the ordinary way, one thinks of a refuge as something in the middle of a crossing, that is to say, somewhere where a pedestrian in crossing a highway can stop and look the other way before crossing the other part of the highway; but it seems equally clear that a refuge may be necessary at the beginning or at the end of a crossing. To take the present case, those pedestrians who, if the scheme goes through, come down Sewardstone Road from north to south and cross the Lea Valley Road, will, if there is no refuge where the defendants propose to erect one, come on to some sunken granite sets in the middle of a wide, forty foot, access. They have thus no safe place to which to go or from which to start. They have crossed the road, but they are nevertheless in the middle of this access. In those circumstances, it seemed perfectly clear that this would be a refuge " for the purpose of making the crossing of any road less dangerous to foot passengers." It seemed that counsel for the plaintiffs' argument, that there was no refuge within the meaning of the Act of 1930 except in the case of pedestrians who are in course of crossing, was based on too narrow a construction of the words in s. 55 of the Act, and that any refuge which made the crossing of a road more safe, whether at the beginning or at the end of, or in the course of the actual crossing, was within the section. As a result, I had almost completed giving judgment on the basis that the so-called obstruction which the defendants seek to erect was a refuge which they had power to erect under s. 55 of the Road Traffic Act, 1930, when it was discovered for the first time that the section had been amended. Indeed, it appears that, as amended by the Road Traffic Act, 1956, that section has now no application to refuges at all.

That being so, I have felt it right to commence my judgment again, the position now being that only two statutory provisions are relied on by the defendants, namely, s. 149 of the Public Health Act, 1875, and s. 45 of the Road Traffic Act, 1956.

I will deal with the latter provision first. Section 45 provides by sub-s. (1):

> " The highway authority for any road repairable by the inhabitants at large shall have power to construct and maintain works in the carriageway ... (c) for providing places of refuge for the protection of foot passengers crossing the road."

There again, I should be prepared to read " places of refuge " as places for the safety of pedestrians who are about to cross or who have just crossed, the road. But the difficulty is, that the power there given is only to " construct and maintain works in the carriageway "; and the place where this refuge is proposed to be erected, though in the highway, is not in the carriageway. Reliance was, however, placed on s. 18 of the Public Health Acts Amendment Act, 1907,

the provision under which the access in question was originally made, because by para. (c) of that section it is provided that:

> "After the completion of the works [i.e., in this case, after 1932, when the works were done] the new means of access may be used, subject to the conditions which, in pursuance of any provisions of the law relating to highways, attach to the use for the like purpose of any carriageway forming part of a highway repairable by the inhabitants at large."

In fact, that section does not now apply, by virtue of the Essex County Council Act, 1952; but, be that as it may, I do not read the words in para. (c) as saying that after the construction of the works the access is deemed to be a carriageway, so that this obstruction, if erected, would be in the carriageway. Accordingly I do not think that the defendants have any power to do what they propose to do under s. 45 of the Road Traffic Act, 1956.

I turn now to s. 149 of the Public Health Act, 1875. That section, which is dealing with the vesting of streets in urban authorities, provides, inter alia, that:

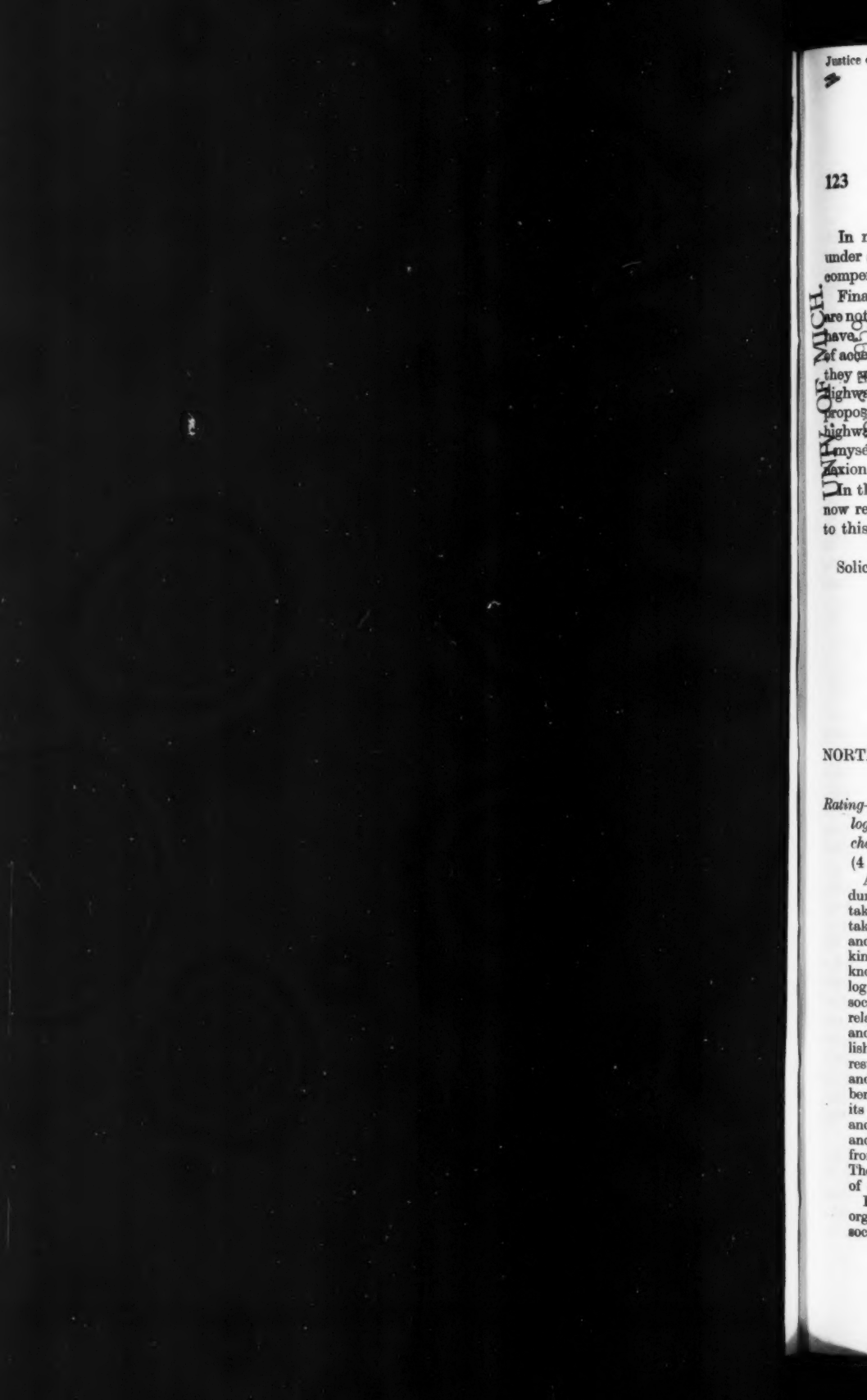
> "The urban authority shall from time to time cause all such streets to be levelled paved metalled flagged channelled altered and repaired as occasion may require."

The only words in that section on which the defendants can rely are "shall cause all such streets to be altered"; and reference has been made to *Sellors* v. *Matlock Bath Local Board* (1). In that case the plaintiff had some land and buildings consisting of an inn and stables abutting on the high road. These stood back from the road and in front of them was a space which had been left open to and on a level with the road until recently, when the defendants had made a footpath on the road outside the plaintiff's land, with raised kerbstones, but leaving openings so that carriages could still go in from and out to the road, but not at every part of the boundary. The plaintiff contended that this was an interference with her right at common law. In the course of his judgment, DENMAN, J., said:

> "Looking at the whole of the clause together, I think it cannot be contended that wherever any person has land adjoining the road which has remained undistinguished from the road, perhaps for centuries, he can as a matter of course restrain the local authorities from making a raised footpath for the accommodation of the public on a part of the road which is vested in them, merely because by so doing they may render it impossible for the time, for the owner of the land, to draw up a carriage close to the exact boundary of his land, or to enter his land, at every inch of the boundary."

I appreciate that in that case a wide meaning was given to the word "altered" but so far as the present case is concerned, the facts are entirely different. There is a footpath there already and the access has been permitted and constructed pursuant to s. 18 of the Public Health Acts Amendment Act, 1907. Reading the section as a whole, I find it difficult to think that the words used cover the construction of this street refuge in these circumstances. Indeed, the construction of any street refuge was probably not within the contemplation of the legislature in 1875, and their construction has been specifically dealt with by later statutes.

(1) (1885), 14 Q.B.D. 928.



In my judgment, the defendants cannot justify the proposed construction under s. 149 of the Act of 1875, but even if I am wrong they would have to pay compensation for any resulting injury under s. 308 of the same Act.

Finally, it was submitted, albeit faintly, on behalf of the defendants that they are not proposing to do anything which interferes with any right that the plaintiffs have. They say: "True, the plaintiffs have always had at common law a right of access at any point on to the highway, but they will still have that right since they will be able to emerge through the opening D to E on the plan on to the highway without any interference." In other words, they maintain that the proposed construction will not prevent the plaintiffs from having access to the highway, but will only interfere with them when they get out into the highway. I myself cannot accede to this argument, since it seems to me that in this connexion access to the highway must mean access to the carriageway.

In these circumstances, I do not think that either of the statutory provisions now relied on enable the defendants to do what they propose to do in regard to this street refuge.

Declaration accordingly.

Solicitors: *Hillearys; C. G. Dennis.*

G.A.K.

COURT OF APPEAL

(LORD EVERSHED, M.R., ROMER AND PEARCE, L.JJ.)

June 17, 18, 1959

NORTH OF ENGLAND ZOOLOGICAL SOCIETY *v.* CHESTER RURAL DISTRICT COUNCIL

Rating—Relief—Organisation concerned with advancement of education—Zoological society incorporated as company limited by guarantee—Main objects charitable—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*), (2).

A society was incorporated as a limited company by guarantee and the memorandum of association stated by cl. 3: "The objects of the society are: (a) To . . . take over as a going concern and conduct as a scientific and educational undertaking the business [of carrying on zoological gardens]. (b) To promote, facilitate and encourage the study of biology, zoology and animal physiology . . . and all kindred sciences and to foster and develop among the people an interest in and knowledge of animal life. (c) To establish, equip and carry on, and develop zoological parks or gardens and living zoological collections at such places as the society shall determine." Thereafter followed some twenty-two paragraphs, relating to various activities, set out without any distinction between main objects and ancillary objects. These provided for the holding of public meetings, publishing books, investing money, engaging orchestras, building and equipping restaurants and other buildings for the convenience of visitors, raising funds, and other matters. By cl. 4 of the memorandum payment of dividends to members of the society was prohibited, and by cl. 9 on the dissolution of the society its assets were not to be distributed among the members. The society owned and managed zoological gardens of some 145 acres containing about 750 animals and reptiles. During recent years the society's income, which was mainly derived from admission fees to the gardens, had appreciably exceeded its expenditure. The surplus income was used in improving the equipment and raising the standards of the zoological gardens.

HELD: (i) looking at the history and operations of the society, it was an organisation not established or conducted for profit; (ii) the main objects of the society were to be found in para. (a), para. (b), and para. (c) of cl. 3 of its

memorandum, the remaining paragraphs containing powers or ancillary objects; the main objects were charitable, or, if not charitable, were at least otherwise concerned with the advancement of education; and, therefore, the society was entitled to limitation of rates under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Decision of VAISEY, J., (1958), ante, p. 47, affirmed.

APPEAL by the defendant rating authority Chester Rural District Council, from an order of VAISEY, J., reported ante, p. 47, whereby he held that, on the true construction of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the plaintiff, the North of England Zoological Society, was an organisation which was not established or conducted for profit and whose main objects were charitable or were otherwise concerned with the advancement of education.

Squibb, Q.C., and *Widdicombe* for the rating authority.

Willis, Q.C., and *Coplestone-Boughey* for the plaintiff society.

LORD EVERSHED, M.R.: This is another case (one of a considerable number now) which has come before the courts on the effect of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Section 8 (1) is in these terms:

> "This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of . . . education . . ."

If the plaintiff, the North of England Zoological Society, which is the respondent to this appeal, can bring itself, as regards the hereditament which it occupies, within the formula which I have read, then it is exempt at the moment from rates. Such was the conclusion of VAISEY, J. From that decision the rating authority, Chester Rural District Council, have appealed to this court. Their anxiety to test the matter further is certainly understandable, since, according to the figures before the court, the society has over a period of years carried on its affairs so that its income has appreciably exceeded its expenditure. In the year ended Dec. 31, 1956, that surplus was about £16,000, and from the balance sheets it would seem that, since the society's incorporation the total accumulated net surplus amounts to about £84,000. It is, however, fair to say that the surplus has clearly been used in extending and improving the equipment and general characteristics of the zoological gardens which are the hereditament here in question. From my reading of s. 8 (1) of the Act of 1955, it will be apprehended that there are here two points, for there is no doubt that the society is an organisation within the meaning of the section. The two points, expressed interrogatively, are: (i) Is this an organisation which is not established or conducted for profit? (ii) Is it one whose main objects are charitable or otherwise concerned with the advancement of education? In order to qualify for exemption, the society must satisfy both those tests: in other words, it must be shown that an affirmative answer should be given to both the questions I have posed.

I will start with some reference to the history of the society and of its ancestry. A zoological garden (which, according to common usage, I shall abbreviate to "zoo") was started as long ago as in 1931 by a Mr. Mottershead, who began it as an undertaking entirely of his own. Counsel for the rating authority, who saw Mr. Mottershead and cross-examined him, told us fairly and frankly, by

way of confirmation of what I would have expected from reading Mr. Mottershead's affidavit, that he is a man who is passionately enthusiastic, as many people are, about animal life. It cannot be doubted that, when Mr. Mottershead started this zoo in 1931, he was not starting something for the purpose of making money, nor was he starting something for the purposes of providing entertainment or amusement or shows to the inhabitants of the north-west part of England. He is an enthusiast regarding animal life, and he was anxious to do something in that part of England which would present species of the animal world in proper and carefully designed conditions, so that those who lived in the neighbourhood would have the advantage of being able to see them and, as he hoped, share his enthusiasm for his favourite subject. After a little time, however, a company, Chester Zoological Gardens, Ltd. was incorporated. It was incorporated as a public company apparently in the ordinary way, but, as has happened to other public companies, its life was somewhat short and financially highly unsatisfactory. After two years it was put into liquidation. The plaintiff society was then formed (originally with the word "Limited" added to its name) as a company limited by guarantee under the Companies Act, 1929, and all the assets of the zoo itself, with its inmates, its equipment and so forth, were transferred to the society. We have not been told what happened about the debts of the old company, but it is quite plain that Mr. Mottershead made no profit out of any of these transactions. He is, as he told counsel for the rating authority in the course of cross-examination, the most substantial shareholder or proprietor of the society. Being a company limited by guarantee and not being a trading corporation for profit purposes, the society was allowed, in 1950, to omit the use of the word "Limited" as part of its name. But it is clear, as counsel for the rating authority frankly admitted, that this is Mr. Mottershead still in another garb. It is true that he is now given a salary, but it is certainly not princely in amount and certainly not indicative that he is doing this work and concerning himself with the society with any idea at all of its being a money-making enterprise. There is no doubt at all about that, and I think it important for reasons to which I shall later revert.

I come now to the society's memorandum of association. Of the two points which I have formulated (namely, (i) is the society conducted for profit, and (ii) are its main objects charitable, etc.?), I shall find it convenient to deal with the latter first. In order to answer the question, "What are the society's main objects?", the first duty of the court is to look at the document of incorporation, which is designed to set out the objects for which the society is formed. In certain of the cases which have arisen under this legislation the question has been debated to what extent one must confine oneself to the charter or the memorandum of association of the organisation concerned and to what extent one is entitled to look at the facts, as proved in evidence, of the exact operations in which the organisation has engaged. I think that I can state briefly the answer to that question by citing a passage from the judgment of this court delivered by ROMER, L.J., in *Berry* v. *St. Marylebone Corpn.* (1), a case concerning the Theosophical Society in England. ROMER, L.J., in reading the court's judgment, said:

> "In our opinion, DEVLIN, J. [in *Chartered Insurance Institute* v. *Corpn. of London* (2)] was saying no more than that, when an organisation has several objects specified in its written constitution, as was the case with the Chartered Insurance Institute, its activities are relevant to an inquiry

(1) [1957] 3 All E.R. 677; [1958] Ch. 406.
(2) 121 J.P. 482; [1957] 2 All E.R. 638.

as to what should, for the purposes of s. 8, be regarded as its main objects. We do not think that the learned judge was intending to go further than that, and, if such was his view, we cannot see that it is open to any criticism. That, however, is a very different thing from saying that, where there is no doubt what the main objects of a body are (and there is no doubt in the present case), evidence of what its activities have been may be received either in order to construe the language by which the objects are described or to limit the proper construction of the language by reference to the activities."

With the guidance of that passage, I take it that the court's duty is, first, to look at the society's memorandum of association and then, having looked at it, to see which of the numerous matters which are stated to be the objects comprise the main objects of the society, and to get some assistance from the evidence on the further question, which of them have been so far in fact the main objects. In so far as the language may be equivocal, it can be seen by reference to what has been done whether assistance can be obtained in solving the equivocation.

As practitioners well know, those who draw up draft memoranda of association these days do not commonly err on the side of brevity. Here the objects of the society are contained in cl. 3, in paragraphs which, after exhausting the alphabet from (a) to (z), then include (aa). It is clear when one looks at them that some of the objects are plainly not main objects on any view; they are more in the nature of powers or are ancillary. Indeed, para. (aa), although the longest in point of language, is clearly of that nature. The first three objects of the society read as follows:

"(a) To acquire and take over as a going concern and conduct as a scientific and educational undertaking the business heretofore carried on as the Chester Zoological Gardens, Upton-by-Chester, by Chester Zoological Gardens, Ltd., together with or any part of the real and personal property and assets of the company used in connexion with that business or belonging thereto.

"(b) To promote, facilitate, and encourage the study of biology, zoology and animal physiology, aviculture, aquaria, ichthyology, entomology, botany and horticulture and all kindred sciences and to foster and develop among the people an interest in and knowledge of animal life.

"(c) To establish, equip, and carry on, and develop zoological parks or gardens and living zoological collections at such places as the society shall determine."

Paragraph (d) refers to the establishment of bird sanctuaries and the like, but, as the argument has developed, I think that I may properly and fairly say that it is by looking at the first three paragraphs, (a), (b) and (c), that one will find the answer to the question: What are the main objects of the society?

In opening the case counsel for the rating authority put his finger on the word "business" twice used in para. (a) as indicating that, under whatever guise it be, this really was a trading operation. I hope counsel will forgive me if I do not take much time about that. There is no doubt that all that the word meant in this reference to taking over "the business heretofore carried on as the Chester Zoological Gardens" was the "undertaking". The work there referred to had been undertaken by a trading body, namely, the company which had been there and presumably had carried on business, but I do not think that that throws any light on the matter for the purposes with which we are concerned. But what is interesting (and it is a point emphasised by counsel for

the society) is that the primary object in para. (a) of cl. 3 of the memorandum of association was expressed thus:

> "To acquire and take over as a going concern and conduct as a scientific and educational undertaking [this subject-matter] . . ."

I think that that is a very important sentence. No doubt, if it was shown that the society was doing nothing in the gardens, certain consequences must follow, but at least those words show that this enterprise (which, let me recall, Mr. Mottershead, this great enthusiast for animal life, had started many years before) was to be conducted as a scientific and educational undertaking. I repeat once more that that, and that only, was the sort of thing in which Mr. Mottershead was interested. I am not, however, to be taken as saying that those few words provide the answer to the question: What are the main objects? I think that it is impossible to overlook paras. (b) and para. (c). But, as FARWELL, J., said in *Re Lopes, Bence-Jones* v. *Zoological Society of London* (1), one cannot read these paragraphs in isolation; they must be read all together.

Paragraph (b) is certainly strictly in line with the words used in para. (a), "scientific and educational undertaking", for it is to promote and encourage the study of various sciences, biology, zoology and so on. When one comes to para. (c), "To establish, equip, and carry on, and develop zoological parks or gardens", I agree that, if it stood alone, it might be said to cover equally the establishment of a zoological park or garden as a mere show piece or amusement place, although it might equally be said to cover the establishment of a zoological garden to achieve the continuance of what had gone on before. I think that it is relevant here to look at Mr. Mottershead's affidavit to see what in fact the society had done. I will not take time by reading at length from it; but I observe, first, that Mr. Mottershead, with his genius and his enterprise, has made it quite plain that he has taken very special care that the surroundings for the animal inmates of the zoo shall be as similar as possible to the natural surroundings in which they would be found in their native haunts. He says (and it is not disputed) that he has carried that aim much further at Chester than it has been carried elsewhere. He gives a number of instances showing how the animals are given these natural surroundings, some of them illustrated by photographs. He says that many wild animals will not breed in captivity unless they are in such natural surroundings, and he states in this part of his affidavit (para. 9) that the society has successfully bred certain creatures and that the zoological gardens are the only place in this country where one particular animal has been successfully bred.

Having mentioned Mr. Mottershead's affidavit, I will at this stage make further reference to what he says in the last two paragraphs. In para. 21 he says that the School of Tropical Medicine in the University of Liverpool has been a member of the society for nineteen years and has made frequent use of the livestock for experimental purposes. In para. 22 he says that the society has from time to time provided material for research and instruction to other institutions of learning, for example, the University of Reading and the Liverpool and Manchester Museums, and he gives as other examples some institutions in Manchester and other parts of England. While I am referring to the affidavit, I should perhaps say, in reference to para. (u) of cl. 3 of the memorandum which authorises the establishment and conduct of refreshment rooms, cigarette stalls, and so on, on the society's property, that Mr. Mottershead deals also with that. But, as the argument has developed, it has become quite plain that this case is not going to turn, and counsel for the rating authority has not suggested

(1) [1930] All E.R. Rep. 45; [1931] 2 Ch. 130.

that it should turn, on the circumstance that these activities give some profit to the society from catering, the sale of cigarettes, sweets and the like.

I conclude, therefore, as did the learned judge, that the answer to the question, " What are the main objects of the society? ", is to be found from reading para. (a), para. (b) and para. (c) of cl. 3 of the memorandum, with the assistance of the evidence, and that that material makes good the proposition which counsel for the society put in the forefront of his case, namely, that the society has conducted and conducts this zoo, not as a place of amusement or as a show place, but, by and large, as an educational or as a scientific and educational undertaking.

In his judgment VAISEY, J., referred to the decision of FARWELL, J., in *Re Lopes* (1), which raised the question, under a gift in a will, whether the Zoological Society of London was a charitable body so that a gift in its favour would be a charitable gift. The London zoo is an institution far older than this institution at Chester. It is over 120 years old. Its charter is expressed with much greater brevity than the modern memorandum of association. So far as is relevant, it is confined to

> " . . . the advancement of zoology and animal physiology, and the introduction of new and curious subjects of the animal kingdom . . ."

Moreover, it is true to say that the London institution originally was that of a small number of fellows and that today its fellows number many thousands. By contrast, the society in the present case has a very small number of fellows, and its fellows are perhaps really little more than season-ticket holders. Its main support is derived from ordinary casual entrance fees of so much per day.

In the report of *Re Lopes* (1) certain facts are set out, including these:

> " [The Zoological Society of London] maintained for the purpose of its scientific work a laboratory, where research work in anatomy and pathology was carried on under the direction of a full-time pathologist, and an anatomical fellow, and research into aquatic life was carried on in the laboratory of the aquarium by an aquarium research fellow. The society had also collected and maintained a library of scientific books and periodicals relating to zoology, which was reputed to be the most complete in the world, and they had published continuously annual volumes of their scientific proceedings."

It is pointed out, with perfect justice, that the Chester zoo cannot boast of any activities at all comparable in scope and reputation with what I have just read. There is no laboratory. It has no full-time trained pathologist or anatomical fellow. It does not contain a library of scientific books and periodicals and its publications are of a much more slight kind than are the proceedings of the London Zoological Society. But Chester zoo is very young. In its thirty years of life it is perhaps not surprising that it has not yet achieved anything like the equipment or the reputation of the London zoo; yet it is fair to the Chester zoo to say that its history, since 1950 at any rate, seems clearly to be that the excess of income over expenditure has been used to improve in every possible way the equipment and the materials, and to raise the standards of the zoo. Again I refer, because I think it is important, to the great interest of Mr. Mottershead in this enterprise. Posing, therefore, the question, whether, considered broadly, the Chester zoo is conducted on lines comparable with the London zoo, or whether it is, on the other hand, no more than a place of amusement, I unhesitatingly agree with the learned judge in thinking that it is the former.

(1) [1930] All E.R. Rep. 45; [1931] 2 Ch. 130.

In his judgment in *Re Lopes* (1) FARWELL, J., after stating the facts in regard to the London zoo, said:

> "Its first object is 'the advancement of zoology and animal physiology'. That is clearly educational—for the advancement of scientific knowledge—and, therefore, charitable. The second object is 'the introduction of new and curious subjects of the animal kingdom'. That object again, having regard to the form of the charter, is charitable. In the first place, although the copulative 'and' is used, and, no doubt, imports two objects, nevertheless I think that the second object must be read in connexion with the first, which may to some extent necessitate it."

I adopt a similar line of reasoning when I refer to para. (c) of cl. 3 of the memorandum in the present case. Now comes the important sentence in the judgment of FARWELL, J.:

> "In the second place, I think that the introduction of non-indigenous animals, exhibited under proper conditions, is distinctly an educational object. It must widen the mind and outlook of everyone to see in the flesh animals, now becoming scarce in many parts of the world, which otherwise people might not see at all. Taking a broad view of the society's objects, I am satisfied that they are charitable, on the ground that they are for the advancement of education."

That judgment, of course, is not binding on this court, although it has stood for twenty-nine years and, so far as I know, has never been challenged. I respectfully agree with it and adopt the passage which I have read. It may be that its language might be applied more widely than is required for the decision of this case; but, at any rate, I think it is true to say that a zoo with objects such as those in para. (a), para. (b) and para. (c) of cl. 3 of the memorandum in the present case, and provided with the means for the exhibition, under proper conditions, of non-indigenous animals, is an "educational object" when conducted in the manner in which Mr. Mottershead has conducted the affairs of the society. As regards "scientific", which is also in para. (a), I have said that there is at the moment nothing which the Chester zoo could boast comparable to the laboratories and other equipment of the London zoo. But, having regard to the existence of some scientific operations which are conducted at the Chester zoo, as stated at the end of Mr. Mottershead's affidavit, there is at any rate a scientific element present here in accordance with the statement of para. (a) of cl. 3 of the memorandum.

Taking, as FARWELL, J., did in *Re Lopes* (1) in the case of the London zoo, the broad view of the society's objects, I think that they satisfy the test that they are charitable. I am at any rate satisfied that, even if they were not (for some reason which has not been developed) strictly charitable, they are at least "otherwise concerned with the advancement of . . . education." There is support for that view in that, according to para. 3 of Mr. Mottershead's affidavit, they have been exempted from income tax under s. 448 of the Income Tax Act, 1952, and given other privileges under the Finance Acts which are only consistent with such a view; but that, of course, is not to say that the rating authority are thereby bound.

Having reached that conclusion on what I have thought to be the main point in the case, I can come to the next question which presents itself on s. 8 (1) (a) of the Act of 1955: Is this organisation one "not established or conducted for profit?" Counsel for the rating authority did not press us to

(1) [1930] All E.R. Rep. 45; [1931] 2 Ch. 130.

say that the society had been established for profit. The terms of the memorandum which prohibited the payment of dividends during the existence of the society (cl. 4) or the distribution of its assets on its dissolution (cl. 9) (12) indicate that on no ordinary use of language could one describe this society (which has been allowed to drop the word " Limited " from its name) as being established for profit. But counsel contended that the satisfactory financial history of the past five or six years, plus the use of the word " business " in para. (a) of cl. 3 of the memorandum, produces the result that this was an organisation " conducted for profit ". That the society has made a profit, in the sense that for those years its income has appreciably exceeded its expenditure, is quite plain, but the words of the statute are " conducted for profit ", and on those words we have again guidance of the highest kind.

In *Guinness Trust (London Fund)* v. *West Ham Corpn.* (1), JENKINS, L.J., delivering the leading judgment, referred to the judgment of this court delivered by PARKER, L.J., in *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (2), and also to the speeches of LORD KEITH OF AVONHOLM, LORD MACDERMOTT and LORD DENNING in that case in the House of Lords. Having made those references, JENKINS, L.J., said:

> " I think that those are all the passages to which I can usefully refer, and notwithstanding the difference between the two cases, they fortify me in the view that ' established or conducted for profit ' in s. 8 (1) of the Act means established for the purpose of making profit or conducted for the purpose of making profit, and does not extend to every organisation which in any circumstances or at any stage in its activities receives something which might be considered in itself to constitute a profit."

I add a brief reference to what LORD DENNING had said, which was cited by JENKINS, L.J.:

> " But the fact that the society has made profits does not mean that it is ' conducted for profit ', which I take to mean ' conducted for the purpose of making profit '. Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects."

The question is one which, I think, must be answered according to the common sense of the matter. If one poses the question: " Looking at the history of the society and the operations which it has conducted, is it a society which is being conducted for profit? ", I would have no hesitation in answering that question negatively. In giving that answer I am now assuming the correctness of my answer on the main question that the society is an educational charity. If it were otherwise, if the true view was that the society's zoo was an amusement park, then the answer to the question, " Is the society conducted for profit? ", might be very different; but, given that this is an educational charity or an educational organisation, then it seems to me that the answer which must be given to the further question which I have posed, namely, " Is the organisation one which is conducted for profit? ", is that it is not; it is one conducted for the advancement of its educational objects and the profits have been entirely used in the furtherance of those objects and for no other purpose.

(1) 123 J.P. 231; [1959] 1 All E.R. 482.
(2) 122 J.P. 399; [1958] 2 All E.R. 601.

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I do not think that *Brighton College* v. *Marriott* (1) can assist for present purposes on the question which we have to decide, because the question whether it was conducted for profit was not the question which was there debated. I therefore conclude that the society in this case has satisfied both branches of the test in s. 8 (1) of the Act, which is what VAISEY, J., also thought. I would accordingly dismiss the appeal.

ROMER, L.J.: I agree. I can summarise my views on this appeal very briefly. It has been quite clearly established by the authorities (there has been a number of decisions on s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955) that in order to claim the benefit of that section a society or other organisation has to show that all its main objects are charitable or otherwise concerned with the advancement of religion, education or social welfare. Accordingly, the respondent society in the present case can only obtain the benefit of the section by saying in effect that, having regard to the whole of its main objects, it is an educational charity. I agree with LORD EVERSHED, M.R., in thinking that, beyond any reasonable doubt, the main objects of the society are to be found in para. (a), para. (b) and para. (c) of cl. 3 of the memorandum of association. It is to be observed that, under para. (a) and para. (b), a distinction is to some extent drawn on the language of the paragraphs between scientific activities and other activities. But taking these three paragraphs by themselves, I have no doubt at all—indeed, without the assistance of *Re Lopes, Bence-Jones* v. *Zoological Society of London* (2), I should have had no difficulty at all in coming to this conclusion—that they reveal a charitable object in the educational sense.

Counsel for the rating authority said that, so far as the scientific aspect of the activities was concerned, the evidence showed that they had been disregarded and that all that remained were the other objects which were referred to in these three paragraphs. I think that it is true that the scientific activities have occupied rather a subordinate place, although they have not by any means been wholly disregarded. But, even if the scientific aspects had been wholly omitted from the factual activities of the society, I do not, for my part, see why the society's objects should be any less charitable, provided that the other parts of them were charitable and had been carried out by the society. The only result of discarding one branch of its activities might be that the members might complain, but, for the purposes of s. 8, to my mind, it is quite unimportant whether the society did or did not give full, or, indeed, any, effect to the scientific approach to the enterprise for which the society was incorporated. But apart from the scientific matters which are mentioned in the objects, for example, in para. (b):

> "To promote, facilitate, and encourage the study of biology, zoology . . . and all kindred sciences . . ."

which objects are clearly charitable, the rest of the objects in para. (a), para. (b) and para. (c) appear to me to be charitable as tending to educate people and to broaden their minds.

As LORD EVERSHED, M.R., said, a similar matter was considered by FARWELL, J., in *Re Lopes* (2) and he expressed himself in language which my Lord has already read and one sentence only of which I will repeat:

> ". . . I think that the introduction of non-indigenous animals, exhibited under proper conditions, is distinctly an educational object."

(1) [1926] A.C. 192.
(2) [1930] All E.R. Rep. 45; [1931] 2 Ch. 130.

With that sentence I fully agree. I would emphasise that in the present case the affidavit of Mr. Mottershead shows that the public here have an advantage which they do not have in a good many zoos in this country or elsewhere, deriving from the fact that Mr. Mottershead and his colleagues have given considerable thought and attention to providing, and have provided, a more or less natural setting in which these various kinds of animals can be seen, so that the public have the advantage, not merely of seeing wild animals behind bars, which is perhaps in itself somewhat unedifying, but the advantage, which to my mind is a distinct educational advantage, of seeing them behaving in surroundings which approximate to their natural surroundings and their native habitat, so that they can observe the habits and conduct of the animals in these surroundings; in other words, the conditions in which, in the present case, the public can see these animals are essentially the "proper conditions" referred to in the phrase which FARWELL, J., used. Accordingly, it is quite clear to me that, both on the relevant paragraphs of the object clause of the memorandum and on the evidence which has been filed as to the precise activities which the society has undertaken, the society has shown (and I entirely agree with the learned judge in so finding) that it is an educational charity. Accordingly, I agree with the judgment which VAISEY, J., gave on that point.

There only remains the further question, which logically, I suppose, comes first, whether the society was established or conducted for profit. As to that there is nothing that I desire to add to what the Master of the Rolls has said. It appears to me to be clear that, so far as this court is concerned, the question must be answered in the negative because of the reasoning in the decision of this court in *Guinness Trust* (*London Fund*) v. *West Ham Corpn.* (1). I accordingly agree that this appeal should be dismissed.

PEARCE, L.J.: I entirely agree with what my Lords have said. The main objects of this undertaking are to be found in para. (a), para. (b) and para. (c) of cl. 3 of the memorandum of association. The learned judge rightly held that this case came within the reasoning and the authority of *Re Lopes, Bence-Jones* v. *Zoological Society of London* (2). I too agree with the observations of FARWELL, J., in that case which LORD EVERSHED, M.R., has read.

Further, in my view, the undertaking was not established or conducted for profit, for the reasons given by this court in *Guinness Trust* (*London Fund*) v. *West Ham Corpn.* (1), reasons which are equally applicable to the facts of this case. For the reasons which LORD EVERSHED, M.R., has given more fully, I agree that this appeal must be dismissed. *Appeal dismissed.*

Solicitors: *Preston, Lane-Claypon & O'Kelly*, for *Gamon & Co.*, Chester: *Field, Roscoe & Co.*, for *Ouseley-Smith & Co.*

F.G.

(1) 123 J.P. 231; [1959] 1 All E.R. 482.
(2) [1930] All E.R. Rep. 45; [1931] 2 Ch. 130.

HOUSE OF LORDS

(VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM AND LORD DENNING)

June 30, July 1, 2, 29, 1959

HUDSON'S BAY CO. *v.* THOMPSON (VALUATION OFFICER)

Rates—De-rating—Industrial hereditament—Adapting for sale—Sorting, grading and matching of skins—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5 *c.* 44), *s.* 3 (1), (2)—*Factory and Workshop Act*, 1901 (1 *Edw.* 7 *c.* 22), *s.* 149 (1).

A hereditament was occupied and used by a company for the sorting, grading and matching of furs and for their arrangement in matched lots of skins of uniform grade for sale at the company's fur auctions. The skins were received from different trappers and breeders at the hereditament. They arrived in bales of unmatched, unsorted and ungraded skins, which in that state would command a very poor price if they were saleable at all. The contents were checked with the invoices and each skin was marked so as to be identified as the property of the owner of that parcel and it remained so identified until made into lots or sold. All the skins were mixed together regardless of ownership and were subjected to a highly skilled process of sorting, grading and matching. They were ultimately made up into lots of matched and graded skins of uniform quality, which included skins from several different trappers or breeders. The lots were sold at the company's periodical fur auctions at prices computed at so much per skin. Each lot was sold, however, for an aggregate lump sum and the owner of a skin or skins in each lot received a proportion of the aggregate price appropriate to the number of his skins in that lot, less commission, all skins in a lot being assumed to be of equal value. This method of selling skins in graded lots produced far better prices than sales of skins by owners individually.

HELD: the process carried on at the hereditament was a dealing with collections or agglomerations of single things (the unit formed by agglomeration being each bale of skins which arrived at the hereditament), and the single skin within a bale was not the unit to be regarded for the purposes of de-rating; thus there was an "adapting for sale" (of the bales of skins) within the meaning of the definition of "workshop" in the Factory and Workshop Act, 1901, s. 149 (1), and the hereditament was an industrial hereditament within s. 3 (1) (2) of the Rating and Valuation (Apportionment) Act, 1928, and entitled to de-rating accordingly.

APPEAL by the ratepayers, the Governor and Company of Adventurers of England trading into Hudson's Bay (commonly known as Hudson's Bay Co.), from an order of the Court of Appeal (JENKINS, SELLERS and PEARCE, L.JJ.), reported [1958] 3 All E.R. 243, affirming a decision of the Lands Tribunal dated Oct. 2, 1957, and reported 2 R.R.C. 211. The ratepayers had appealed against a decision of a local valuation court of Central London Local Valuation Panel, confirming the assessment of a hereditament described as a warehouse, offices and cold store, Great Trinity Lane, 26-30, Little Trinity Lane, 1-13, Garlick Hill and 1-6, Sugar Loaf Court, Beaver House, in Part I of the valuation list for the City of London at £15,818 gross value, £13,178 rateable value. The facts are set out in the opinion of VISCOUNT SIMONDS.

Willis, Q.C., and *Roots, Q.C.*, for the appellants.
Widgery, Q.C., and *J. R. Phillips* for the respondent.

Their Lordships took time for consideration.

July 29. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal from an order of the Court of Appeal affirming a decision of the Lands Tribunal on an appeal from the Central London Local Valuation Court raises the question whether a certain hereditament in the City of London occupied by the appellants, the Hudson's

Bay Co., is " an industrial hereditament " as defined by s. 3 of the Rating and Valuation (Apportionment) Act, 1928. It is common ground between the parties that it is such a hereditament if, and only if, it is a workshop as defined by s. 149 (1) of the Factory and Workshop Act, 1901, the relevant part of which I set out:

> " The expression ' workshop ' means— . . . (b) any premises, room or place, not being a factory, in which premises, room or place . . . any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely: . . . (iii) the adapting for sale of any article, and to or over which premises, room or place the employer of the persons working therein has the right of access or control."

The question, therefore, involves two considerations, first, whether, on the hereditament in question, any manual labour is exercised in the manner indicated in the section and, secondly, whether it is exercised for the purpose of adapting any article for sale. Unfortunately, the first of these considerations has been lost sight of in the course of the case, and their Lordships have, therefore, found it impossible to dispose finally of the matter. They have, however, found it possible to deal conclusively with the second and, perhaps, more difficult question, viz., whether the activities of the appellants, whether or not they can properly be called manual labour, were exercised for the purpose of adapting an article for sale.

The case came before the Court of Appeal on Case Stated by the Lands Tribunal at the request of the appellants, the question on which the decision of the court was desired being, whether there was any evidence on which the tribunal could make the findings of fact set out in para. 5 of the Case, and whether, on those findings, it came to a correct decision in law. It will be remembered, that, under s. 3 of the Lands Tribunal Act, 1949, the decision of the tribunal is final except that any person being aggrieved by the decision as being erroneous in point of law may require the tribunal to sign and state a Case for the decision of the court. The contention of the appellants was that there was no evidence on which the tribunal could make the said findings of fact to support their decision that the hereditament in question was not an " industrial hereditament " and that, on the facts set out in the Case and the annexures thereto, it was in law an " industrial hereditament ".

The materials before the court were not only the Case Stated, to which, as a separate document, was appended the lengthy decision of the tribunal, itself containing a further statement of facts, but also the oral and other evidence which had been before the tribunal. In view of the form of question and the contention of the appellants, no other course was open, but it involves a detailed consideration of facts which is not altogether appropriate to the procedure by way of Case Stated. I will be as brief as I can, but I see no alternative to setting out the facts first as set out in the formal Case, then as supplemented in the decision and finally as explained or amplified in the evidence.

The hereditament in question is described as Warehouse Offices, and Cold Store, Great Trinity Lane, 26-30 Little Trinity Lane, 1-13 Garlick Hill and 1-6 Sugar Loaf Court " Beaver House ", and is entered in Part I of the valuation list for the rating area of the City of London at gross value £15,818 and rateable value £13,178. Your Lordships are not concerned with the question which was at one time raised, whether the hereditament which, in fact, consists of three parts known as Beaver Hall, the Carpenter's Workshop and Beaver House should be assessed as three separate hereditaments. The sole question is whether the activities carried on at Beaver House are such as to constitute it an industrial hereditament. If they are, the necessary adjustment and apportionment of the rate must

be made. The question in the Case refers specifically to the findings in para. 5 thereof, and I cannot fairly abbreviate them. They are as follows:

"I am informed that the appellants desire to contend that there was in point of law no evidence to support my findings of fact set out hereunder:—

"(A) 'I put it this way—without the sorting and grading the buyer, unless he were himself an expert, would be taking a risk but the skins are still saleable . . . the conclusion I have come to is that the only effect of the sorting and grading was to certify that the skins were of such a quality as to merit being placed in the category in which they appear in the auction catalogue.'

"(B) 'What is emptied out of the bales that come into the Hudson's Bay Co. is not a huge amorphous mass. It is a bundle of easily identifiable individual skins. They are sent in bundles merely for the convenience of despatch. It is not like the rag case, *Kaye* (*Dewsbury Revenue Officer*) v. *Burrows & Dewsbury Assessment Committee* (1) or the seed case, *Hines* (*Ipswich Revenue Officer*) v. *Eastern Counties Farmers' Co-operative Assocn.* (2) in that it is not what has come to be known as a "bulk" case at all. It is not the intention that the skins should be made into a bulk and sold as a bulk. Each skin is sent to the Hudson's Bay Co. to be sold as a skin, in fact the owner might send only one skin although admittedly this would be unusual. It is also bought as a single skin although the bidder bids for a lot that are matched. In a word selling in lots is only for the convenience of the buyer.'

"(C) 'All that has been done here was to arrange the skins.'

"'In my view the process carried out in Beaver House, highly technical as I concede it is, is merely an identification of skins and their arrangement in price classes for sale. Nothing has been done to any skin which in any way makes it a little different to what it was before—I ignore the cleaning of the skins in the drum because it applied to a negligible number of the skins dealt with in Beaver House. There has therefore been no adapting for sale'."

At an earlier stage, the tribunal had referred to certain additional facts which were admitted though not referred to in its decision. They were (so far as now material) (i) that very approximately twenty-five per cent. of the skins coming into Beaver House are owned by the appellants and seventy-five per cent. by other persons (but these are very variable figures); (ii) that each skin (except musquash) is labelled on arrival at Beaver House with the object of making that skin identifiable as the property of a particular customer at all stages, that large numbers of musquash are dealt with but their value is small, both individually and collectively, in relation to the appellants' turnover, usually one bale of musquash providing one or two satisfactory lots, the identity of which can be preserved without ticketing; (iii) that some furs are sold by private treaty at Beaver House; and (iv) that no one buys furs at the auctions except with a view to resale, and the Committee of London Public Fur Sales does not regard a private individual as an authorised trader. It appeared at the hearing before your Lordships that the facts admitted under (ii) as to identification were not strictly accurate, but I do not think that anything turns on this.

I must next, at the risk of some repetition, state some of the further facts as found in the decision of the tribunal which forms part of the Case. It is necessary to refer only briefly to that part of the hereditament known as Beaver Hall. It

(1) 95 J.P. 115; [1931] All E.R. Rep. 242; [1931] A.C. 454.
(2) 95 J.P. 115; [1931] All E.R. Rep. 242; [1931] A.C. 456.

is there that auction sales of fur are carried on under the conduct of a committee known as the Committee of London Public Fur Sales which operate under an agreement made between the appellants and certain other companies and partnerships. Nor need I mention further the carpenter's workshop. It is on the activities carried on in Beaver House that the issue turns. They are described by the tribunal as follows:

> "Bales of skins are addressed from almost all parts of the world except the Soviet Union. They arrive in lorries at the reception basement. There they are unloaded on to lifts and conveyed to the first floor where the bales are opened and are sorted according to types—the bales consist of mixed skins of various animals. The sorted bundles are then passed up to the next floor, some of the skins which may be dusty or gritty are put in drums with clean sawdust and whirled round. This eliminates the dust and grit. This process is necessary only in the case of very few, indeed almost a negligible quantity of the skins that come in. Next comes the process on which the appellants mainly rely to establish their contention that there is an adaptation for sale. The skins are passed along in trollies to the sorters' counters. The counters extend along the room which is especially lighted with artificial light and large windows. The sorters are men who have been specially trained in the art of sorting. It is said that it takes about ten years to make a man an entirely efficient sorter. The sorter takes the skin and grades it either by its feel or visual appearance. Immediately behind the sorter is a trolley with various shelves. Each shelf represents the class which the sorter assigns to the skin. These grades of skin are then conveyed to another sorting room where there are sorters who can be described as final specialists. These sorters examine the skins and either confirm the grading or up or down grade the skins again. After this final grading the skins are catalogued and passed down to the display room. There they are displayed for some days and prospective buyers come along to examine them and bid for them at the auctions which are held about three times yearly.
>
> "The skins are still in a raw state in the sense that they could not be used as furs. They have to undergo a highly technical process which converts them from skins into saleable furs. This process is not undertaken at Beaver House. It is carried out by the furriers who buy the skins at the auction."

On these findings, the tribunal came to the conclusion, after a consideration of certain cases to which I must refer, that

> "the only effect of the sorting and grading was to certify that the skins were of such a quality as to merit being placed in the category in which they appear in the auction catalogue."

The tribunal further held (distinguishing cases called "the seed case" and "the rag case" which I must examine) that the bales of skins that come to the appellants are bundles of easily identifiable individual skins, being sent in bundles merely for the convenience of despatch, that it is not the intention that the skins should be made into a "bulk" and sold as a bulk, that each skin is sent to the appellants to be sold as a skin—in fact, the owner might send only one skin although, admittedly, this would be unusual—that it is also bought as a single skin although the bidder bids for a lot of skins that are matched, in a word that selling in lots is only for the convenience of the buyer. I conclude my reference to the decision of the tribunal by citing its penultimate paragraph:

> "In my view the process carried out in Beaver House, highly technical as I concede it, is merely an identification of skins and their arrangement in

price classes for sale. Nothing has been done to any skin which in any way makes it a little different to what it was before—I ignore the cleaning of the skins in the drum because it applied to a negligible number of the skins dealt with in Beaver House. There has therefore been no adapting for sale."

Before I examine the conclusions of the tribunal, which were, in effect, adopted by the Court of Appeal, I must refer to some further facts which appeared plainly from the evidence and were relied on by the appellants. The furs which are sent to the appellants from a great many countries in the world are sent

> "to be graded and presented to the fur trade in such a manner as to command for them, the producers, the best possible market price. They enjoy the careful . . . handling of the furs to suit the requirements of various fur purchasers all over the world, which is such that the producer will get a great deal more money for his goods than if he sold his merchandise in an unassorted condition."

The bales of fur do not always have the same sort of fur. For instance, a bale from Canada will contain practically every kind of wild fur, and, even where a bale consists predominantly of one type of fur, e.g., of mink or Persian lamb, there would be a great variety in the type. There are, for instance, 250 recognised main grades and 880 sub-grades of Persian lamb and, in a single bundle of the same type from a consignor, there would be a large number of different grades. Thus, the components of one bale when sorted and graded would find their place in a number of different lots in which they would be matched with skins coming from a number of other bales. It may be emphasised that the job of sorting, grading and matching is a highly skilled one, the top sorters being paid a basic wage up to £12 2s. In the result, an individual skin arrives in a bale which has to be sorted and graded as described; it goes out in a lot consisting of a bundle of evenly matched similar skins. By this means it realises a price which it otherwise could by no means have realised. I think it desirable to set out certain questions put to the appellants' witness, Mr. Frayling, in cross-examination and his answers:

> "Q.—From the moment you receive the skins to the moment you sell them, would it be fair to say the object of what you do is to achieve the best possible sale price for each individual skin? A.—Most certainly.
>
> "Q.—That is what you are trying to do? A.—Exactly what we are trying to do, yes.
>
> "Q.—As you indicated yesterday, the skin may vary enormously in value in one consignment. Your job is to try and get the best price, skin per skin? A.—Yes, by means of putting them with skins of equivalent value.
>
> "Q.—And the way you do that is, whether the skin is good or bad in itself you sell it to the greatest advantage by selling in company with other skins as near as possible identical with it? A.—That is the object of the process, putting like and like together."

I set out these questions and answers at length because it appears to me that a misunderstanding of them has been the vital factor in leading the tribunal and the court to a wrong decision. For though, no doubt, it was possible to know how many of a lot of (say) one hundred mink skins had been consigned by a particular consignor and, perhaps, also to know, though this was not wholly clear, which of those skins had been consigned by that consignor, the price paid at the auction for that lot was a lump sum which was apportioned among the several consignors according to the number of skins consigned by them respectively which were in that lot. The skins were not sold skin by skin, though they

were sold in a lot at a price per skin. If they had been sold skin by skin, they would not have realised a comparable price. In fact, the whole object of the process was to get a price which could not be got by individual sales. It is, therefore, in my opinion, wholly unrealistic to treat as the article which has to be adapted for sale a single mink skin which has arrived in a bale with other skins whether of mink or other animals. This is, to my mind, the decisive consideration in the case. For it might well be that, if one regards each skin as a single unit arriving at and departing from the premises, it would be difficult to say in the words of VISCOUNT DUNEDIN in *Grove* (*Dudley Revenue Officer*) v. *Lloyd's British Testing Co., Ltd.* (1) that anything is done to it on the premises " which, in some way, makes it in itself a little different from what it was before ". It is, I think, just because this is what I have called an unrealistic way of looking at such a transaction, that a principle has been established which, in my opinion, governs the present case. It is that, where the process can fairly be regarded as a dealing with a collection or agglomeration of single things, then the scope for adaptation for sale may be wider—I here use the language of LORD MACDERMOTT, C.J., in his very valuable judgment in *Valuation Comr.* v. *McAllister* (2). That learned judge there decided that premises to which eggs are delivered in bulk for the purposes of testing, grading, stamping and packing are premises used for the purpose of adapting articles for sale and, therefore, are industrial hereditaments within the meaning of the Northern Ireland Act. He had already expressed the opinion that, if, in the words of the section, the " adapting for sale of any article " meant the adapting for sale of each egg, there had been no such adaptation, but was able to come to the conclusion which I would say plainly accords with the common sense of the matter, viz., that the premises were used not for the receipt of single eggs and their subsequent sale egg by egg but for the receipt of a collection of eggs in crates and their subsequent sale in lots which, since they had undergone the process of testing, grading, stamping and packing, differed widely from the original collection. He held, in effect, that the " article " in such a case is the collection, and that it is that to which one must look to see whether there has been adaptation for sale. If so, the process to which the collection of eggs was subjected was an adaptation for sale. In coming to this conclusion the learned lord chief justice was amply supported by the authorities that he cited to some of which I will refer. In doing so I find myself adopting much that he has said.

My Lords, it appears to me on an examination of the facts in the present case that there is as little justification for regarding a single skin as the article whose adaptation for sale is required as there was in *McAllister's* case (2) for so regarding a single egg or in *Kaye* (*Dewsbury Revenue Officer*) v. *Burrows & Dewsbury Assessment Committee* (3) for so regarding rag or in *Hines* (*Ipswich Revenue Officer*) v. *Eastern Counties Farmers' Co-operative Assocn., Ltd.* (4) for so regarding a single seed. The words of SCRUTTON, L.J., in the seed case cited with approval by LORD DUNEDIN are precisely apposite:

> " In my view there was both alteration of substance and adapting for sale in sorting and making a substantially different article in bulk from that which existed before the processes were applied. In my opinion, you cannot deal with the case by saying there was a seed before the process and the same seed after the process. The process has altered the bulk and made it legally and commercially saleable."

(1) 95 J.P. 115; [1931] All E.R. Rep. 242; [1931] A.C. 450.
(2) [1954] N.I. 54.
(3) 95 J.P. 115; [1931] All E.R. Rep. 242; [1931] A.C. 454.
(4) 95 J.P. 115; [1931] All E.R. Rep. 242; [1931] A.C. 456.

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The word " bulk " has crept into these cases and it is useful as signifying that the " article " may be something more than a single unit in a collection of more or less similar units. But the word is not in the statute, and should not be used to limit the cases in which something other than a single unit can qualify as the " article " which must be adapted. I am led to this observation by the reiteration in the decision of the tribunal and in the judgment of the Court of Appeal that this is not to be regarded as a " bulk case ". As has often been said, each case must depend on its facts. The processes which adapt the contents of crates of eggs, bales of furs, and " amorphous masses " of rags for sale are widely different, but in all alike something takes place which transforms an unsaleable article into one that is legally and commercially saleable. (I interpolate that, when the statute speaks of adapting for sale, it must mean for commercial sale; presumably, even an " amorphous mass " of rags or an unsorted bale of furs might be saleable at some price to somebody.) But I must repeat that the primary facts as found by the tribunal or disclosed in the annexures to the Special Case lead neither to the conclusion that the *only* effect of the sorting and grading was to certify the quality of particular skins, nor that the skins are sent in bundles merely for the convenience of despatch, nor that it was not the intention that the skins should be made into a bulk and sold as a bulk, if by that was meant that the consignor did not intend his skins to be matched with other skins and sold in a lot with them, nor that each skin was sold as a single skin nor that selling in lots was only for the convenience of the buyer. This complete misconception of an activity, which, in fact, transformed a bale of unsorted and ungraded furs, itself commercially unsaleable, into the constituent parts of a number of saleable lots, in my opinion vitiates the conclusion of both the tribunal and the Court of Appeal. There was, in my view, no evidence which justifies the findings of fact made by the tribunal. It follows that it came to a conclusion which was erroneous in law.

I have referred, my Lords, only briefly to some of the many cases which were cited to us. They illustrate on the one side of the line or the other the principle that must guide our decision, and I do not think that any useful purpose would be served by a closer examination of them. That task has been performed better than I could do it by the lord chief justice of Northern Ireland in *McAllister's* case (1), and I respectfully endorse what he has said.

It remains, however, to say a word about an aspect of the case which has been ignored. The tribunal in its decision observed that counsel for the respondent submitted that the activity of the appellants was not what he called " a factory operation " for two reasons, first, because it did not involve " manual labour " as correctly understood and, secondly, that it did not involve an adapting for sale in accordance with the terms of the authorities. The tribunal, having decided in favour of the respondent on the second point, did not think it necessary to decide the first. The same course was followed by the Court of Appeal. A different view being taken on the second point by this House, the respondent by his counsel fairly enough contends that he is entitled to have a finding of fact made and a decision given by the tribunal on the first point. This is not to be gainsaid. Therefore your Lordships should, in my opinion, allow the appeal with costs here and below in regard to the adapting for sale of the furs which arrive at Beaver House but remit to the tribunal for further determination the question whether, in the words of the statute, any manual labour is exercised on the premises for the purpose of the adapting for sale.

(1) [1954] N.I. 54.

LORD REID: My Lords, the appellants carry on business at Beaver House, London, and they claim that, by reason of the operations which they carry on there, this is an industrial hereditament entitled to de-rating under the Rating and Valuation (Apportionment) Act, 1928. Under s. 3, it is an industrial hereditament if it is occupied and used as a factory or workshop. No question arises under the proviso to s. 3 (1), and the premises are not said to be a factory, so the question is whether they are a workshop within the meaning of s. 149 of the Factory and Workshop Act, 1901. The relevant parts of that section are:

> " (1) Subject to the provisions of this section, the following expressions have in this Act the meanings hereby assigned to them; that is to say:— . . . The expression ' workshop ' means— . . . (b) any premises, room or place, not being a factory, in which premises, room or place or within the close or curtilage or precincts of which premises any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—(i) the making of any article or of part of any article; or (ii) the altering, repairing, ornamenting or finishing of any article; or (iii) the adapting for sale of any article; and to or over which premises, room or place the employer of the persons working therein has the right of access or control."

The appellants contend that these premises satisfy the requirements of that definition and, in particular, that they are used for " the adapting for sale of any article ". Two questions arise under this definition; not only must it be shown that premises are used for one (or more) of the stated purposes, but it must also be shown that manual labour is exercised in or incidental to that purpose. The Central London Local Valuation Court decided against the present appellants and this decision was affirmed by the Lands Tribunal (Sir W. FITZGERALD, Q.C., President). A Case Stated was asked for, and I must quote the following passages from the Case:

> " 3. At the hearing before me the facts, which were proved or admitted, and the contentions put forward by the parties, are contained in my decision, a signed copy of which is annexed hereto and forms part of this Case, save that the following further facts were admitted although not referred to in my decision:—[Then follow certain further findings of fact.]
>
> " 5. I am informed that the appellants desire to contend that there was in point of law no evidence to support my findings of fact set out hereunder:—
>
> " (A) ' I put it this way—without the sorting and grading the buyer, unless he were himself an expert, would be taking a risk but the skins are still saleable . . . the conclusion I have come to is that the only effect of the sorting and grading was to certify that the skins were of such a quality as to merit being placed in the category in which they appear in the auction catalogue.'
>
> " (B) ' What is emptied out of the bales that come into the Hudson's Bay Co. is not a huge amorphous mass. It is a bundle of easily identifiable individual skins. They are sent in bundles merely for the convenience of despatch. It is not like the rag case or the seed case in that it is not what has come to be known as a " bulk " case at all. It is not the intention that the skins should be made into a bulk and sold as a bulk. Each skin is sent to the Hudson's Bay Co. to be sold as a skin, in fact the owner might send only one skin although admittedly this would be unusual. It is also bought as a single skin although the bidder bids for a lot that are matched. In a word selling in lots is only for the convenience of the buyer.'
>
> " (C) ' All that has been done here was to arrange the skins. In my view the process carried out in Beaver House, highly technical as I concede it is,

is merely an identification of skins and their arrangement in price classes for sale. Nothing has been done to any skin which in any way makes it a little different to what it was before—I ignore the cleaning of the skins in the drum because it applied to a negligible number of the skins dealt with in Beaver House. There has therefore been no adapting for sale.'

"An extract from the transcript of the shorthand notes containing the evidence relating to these matters (marked A) is annexed to and forms part of this Case."

It appears from the learned president's decision that counsel for the present respondents argued two points: first, that the appellants' operations did not "involve manual labour as correctly understood", and secondly, that they did not "involve an adapting for sale in accordance with the terms of the authorities". The learned president decided against the appellants on the latter question and made no further reference to the first question—no doubt because that was unnecessary once he had decided the other question against the appellants. But there can be no decision that this is an industrial hereditament unless both questions are decided in favour of the appellants. The respondent still maintains his first point and, accordingly, if your Lordships are disposed to allow this appeal on the question of adapting for sale, either the first question must now be decided by this House on such material as is available, or the case must be sent back to the Lands Tribunal so that the learned president may decide the point. I agree with your Lordships that the latter course should be adopted. But, in considering whether there was "adapting for sale", the definition of "workshop" must be read as a whole and, while I express no opinion of any kind whether manual labour was exercised in this case, I must, I think, consider the general question of the meaning of "adapted for sale" on the footing that I am only dealing with cases where manual labour is being exercised; so I must leave out of account cases where there might seem to be "adapting for sale" without the exercise of manual labour.

The first question which we have to decide is whether there was evidence to support the findings which I have quoted. For reasons which I shall give in a moment, I am of opinion there was not. But I do not think that we can stop there. The second part of the question in the Case is "and whether upon the findings of fact I came to a correct decision in law". If we reject these findings of the tribunal we must, I think, come to our own conclusions on these matters and then determine whether there was "adapting for sale"—assuming, as I have said, that manual labour has been exercised in or incidental to the process.

I take first the facts other than those set out above. I think that they can be summarised in this way. Parcels of skins are sent to the appellants from all parts of the world with a view to each skin in the parcel being graded and then matched with and made up into a lot with skins sent by other consignors so that the lot can be sold by auction. The skins in any one lot, which may contain perhaps seventy to a hundred skins, are held to be of equal value. So the price, after deducting commission, etc., is divided in equal shares among those consignors whose skins form part of the lot. If only one skin in the lot came from a particular consignor he gets one share; if, say, ten skins in the lot came from him he gets ten shares. In fact, it appears that the lot is bid for and sold at a price per skin, but I can attach no importance to that. The price paid by the buyer is a single sum, the number of skins in the lot multiplied by the sum bid per skin. And the buyer has no concern with, and may have no knowledge of, who were the consignors of the various skins in the lot. When a consignment is received, the appellants label each skin in it to show from whom it came. This is necessary

so that when lots are made up a record can be kept of how many skins in the lot came from a particular consignor. In the case of mink skins these identifications remain until the lot is sold; in the case of other skins the identifications are removed when they are made up into lots, and thereafter it is impossible to tell which skin in the lot came from which consignor.

For a complete picture, I must notice three other kinds of consignments. They are not dealt with specially by the tribunal for the good reason that they are relatively unimportant. A number of the skins coming to these premises already belong to the appellants, having been bought by them in Canada and elsewhere. Then musquash skins are dealt with in a somewhat different way. And it appears that some skins have already been graded before arrival. I shall say no more about these cases. Grading and matching are highly skilled operations, and grading is done in stages. The miscellaneous skins which come in are separated on inspection into, say, six or ten groups. Then each of these groups is again inspected and subdivided into smaller groups and so on. This may entail five successive inspections of each skin, and this is necessary because there are no less than 250 main grades of Persian lamb and 468 main grades of mink. The importance of these operations may be seen from the fact that the appellants charge a commission of six per cent. on skins sent in in the ordinary way, whereas they only charge 1½ per cent. in the few cases in which skins have been sorted and graded before arrival. The reason why consignors send in skins to be dealt with in this way is that they get a much better price for each skin than they could get if they sold ungraded and unmatched parcels or single skins. It appears that there is no market in London for ungraded and unmatched skins. They get a much better price because buyers can rely on the grading matching and cataloguing done by the appellants; they appear to require matched skins and in this way they get what they want. Buyers come to these sales from many countries.

I can now return to the findings in fact which are challenged. In finding (A) it is said that

> "the only effect of the sorting and grading was to certify that the skins were of such a quality as to merit being placed in the category in which they appear in the auction catalogue."

But the skins never appear in the auction catalogue. What appears in the catalogue and what is sold is a matched set of skins. No doubt the sorting and grading do certify the merit of each skin but, on my reading of the evidence, this is far from being its only effect. The real purpose of the sorting and grading is to enable individual skins to be assembled into matched lots such as buyers wish to buy.

In finding (B) it is said:

> "It is not the intention that the skins should be made into a bulk and sold as a bulk. Each skin is sent to the Hudson's Bay Co. to be sold as a skin."

To my mind, the evidence contradicts that, and shows clearly that the intention was that the skins should be assembled into aggregates or matched sets, that no skins should be sold as a separate skin, but that all should be sold as parts of sets. I think that this was the intention, whether a consignor sent a single skin or a parcel of skins. Then it is said that the skin is also bought as a single skin, but the whole evidence is to the effect that what the buyer wants and buys is not single skins but matched sets. If each skin were sold and bought as a single skin, then a buyer who buys a lot of a hundred skins must enter into a hundred contracts. That seems to me an impossible interpretation of the facts. Suppose

a lot does not conform to the description in the catalogue or to the sample shown before the auction because one or two skins have not been properly graded and matched. It was not disputed by counsel for the respondents that the buyer would be entitled to reject the whole lot. How could he reject those skins in the lot which conform to the description and sample if there were a hundred different contracts. As regards the skins to which no objection could be taken, there would be no breach of the contracts under which they were sold. Then it was argued that there might not be a hundred different contracts, but that, if the lot contained skins coming from, say, twenty different consignors, there would be separate contracts with each consignor, each contract including all the skins in the lot which came from him. That in itself would make little difference. But then it was said that each contract, whether for a single skin or for several skins in a lot, must be deemed to contain a condition that, if the buyer were entitled to reject any of the other skins in the lot, he could also reject the skins comprised in the contract although no exception could be taken to them individually. This appears to me to be a wholly artificial conception. Moreover, a buyer may have no means of knowing who the consignors were and who he is to sue if he finds it necessary to raise an action. Is he to sue a number of defendants in respect of a number of contracts with different people whose names he could only obtain from the appellants ? In my opinion, the skins in the lot were clearly sold as one lot under one contract. We do not have either the conditions under which consignors sent their skins to the appellants or the conditions governing the sales by auction. I would be very surprised if there were anything in them to bear out this finding, and, in the absence of these conditions, I think that we must hold that these operations have been conducted in a reasonable manner and that no such complications as are suggested have been introduced. They might well make the whole scheme unworkable. I see no difficulty in law in the consignors making agreements with the appellants under which the appellants are entitled to sell their skins together with skins belonging to others to a buyer who buys the lot under a single contract. But I would not like to try to draft conditions which resulted in the fall of the hammer creating a hundred different contracts with the buyer.

Finding (C) adds nothing new to the findings in fact, but perhaps it gives a clue as to how the learned president came to make these findings. He appears to have thought that, because the skins were readily identifiable when received by the appellants and also identifiable when sold to the buyers, a lot which was sold could not in law be regarded as anything other than a number of separate skins, and so he may have thought that, in fact, they were sold as separate skins. I shall have to deal with the legal position later, but it may be that the learned president's understanding is in accordance with some practice which has prevailed in the past and should not be imputed to him as a serious error.

Do the facts which I have summarised involve " adapting for sale " or not ? That depends on the proper construction of those words in the Act of 1901, and on that matter we find authoritative guidance in the series of cases reported as *Bailey* (*Stoke-on-Trent Revenue Officer*) v. *Potteries Electric Traction Co., Ltd.* (1), and *Sedgwick* (*Camberwell Revenue Officer*) v. *Camberwell Assessment Committee & Watney, Combe, Reid & Co.* (2). I get most help from that part of the judgment of SCRUTTON, L.J., which deals with what he calls processes roughly described as sorting, parts of which were expressly approved in this House and no part of which was disapproved. We were construing words in the Factories

(1) 95 J.P. 64; [1931] A.C. 151.
(2) 95 J.P. 115; [1931] All E.R. Rep. 242; [1931] A.C. 447.

Acts, and SCRUTTON, L.J., began by pointing out that, if we deprived the occupier of the benefit of de-rating, we were also depriving the workers of the protection of these Acts, and that, in construing these Acts, the courts had given a wide meaning to their words, e.g.,

> " Putting chocolates into a decorated box, in *Fuller's* case [*Fullers, Ltd.* v. *Squire* (1)] . . . [has] been treated as ' adapting for sale ' to protect the workpeople employed in that occupation."

In reading this judgment and VISCOUNT DUNEDIN'S speech in this House, it should be borne in mind that they did not have to deal with a case where individual things were assembled into an aggregate which was saleable when the individual things were not, or which at least fetched a much better price than the total of any sums which could have been got by selling the things separately. They were dealing with cases where things (rags and seeds) came in in bulk. SCRUTTON, L.J., said that these cases

> " . . . cannot be determined simply by saying: ' no sorting is adaptation for sale '. The original bulk may be such that it cannot be sold either legally, as in mixed seeds, or commercially, because an unsorted bulk is not wanted, and the process of sorting may be so complicated and mechanical as to deserve the title of a manufacturing process, i.e., of ' adapting for sale '. On the other hand, the bulk and the article to be sold may be so similar and of such a nature, such as taking a quarter of a pound of bulls-eyes out of a bulk in a bottle, that the separation or sorting may well be regarded as an entirely minor incident of the sale or distribution."

When he used the words " mechanical " and " manufacturing process ", he was dealing with a question whether premises were a factory. The question here is whether they are a workshop, and I find in s. 149 (4) of the Act of 1901 reference to " the manufacturing process or handicraft carried on in the factory or workshop ", so it would, I think, be legitimate to adapt his words and ask whether this process deserves the title of " a handicraft ". Then SCRUTTON, L.J., continued:

> " Where substantial changes are made in the article, as in the seed-cleaning case, I see no difficulty in holding the process to be adapting for sale. But in view of the fact that ' adapting for sale ' is a separate head from altering, I see no reason for requiring alteration of substance to make ' adapting for sale '. If this were necessary, there would be no need to insert ' adapting for sale '. Where the process of separation or sorting is complicated and substantial, again I think there is adapting for sale. In many cases, it is a question of degree, which is in my view fact and not law, and not properly the subject of a Special Case. Further, the section in the Factory Act, 1901, deals with an ' article ', which I think means an article to be sold."

I may say in passing that it is unnecessary to deal in this case with the vexed question of what is fact and what is law because, if the findings in fact of the tribunal cannot stand, the whole matter is open for us. I shall return to the rest of the quotation when I come to the so-called bulk principle.

Following the line of that judgment, I would think the question in this case to be whether things which cannot be sold commercially because they are not wanted (individual skins or miscellaneous parcels of skins) have been made into articles readily saleable (matched sets of skins) by a process sufficiently

(1) 65 J.P. 660; [1901] 2 K.B. 209.

complicated and substantial to deserve the title of "handicraft". And I would further think that there can be adapting for sale without alteration of substance, for the reason given in the passage I have quoted. But this is said to be in conflict with the view of LORD DUNEDIN in the cable testing case (1):

> "I think 'adapting for sale' points clearly to something being done to the article in question which, in some way, makes it in itself a little different from what it was before."

In the cable testing case, the cable came in unassociated with any other article and it went out unassociated with any other. LORD DUNEDIN had set out the conflicting views between which he had to choose. SLESSER, L.J., had said: "The testing of the cables . . . was . . . part of the process of making them fit for . . . sale", and SCRUTTON, L.J., had said: "the cables . . . are not adapted for sale, but tested to see if they are fit for sale". LORD DUNEDIN's apt illustration was:

> "If a horse is passed sound by a veterinary surgeon it becomes saleable in a way it was not before it was so passed, but no one would dream of saying that the veterinary surgeon by his certificate adapted the horse for sale."

Certainly testing or certifying is not adapting, and, where there is no question of association with other things, I wholly agree that adapting must involve some physical change—some alteration of the article. But I do not think that LORD DUNEDIN meant to say that, commercially at least, the whole can never be greater than or different from the sum of its parts. He was not dealing with any such question and I think it worth noting that at the end of his speech he said:

> "It may be difficult or impossible to identify the essential quality of the operation described in s. 149 of the Factory and Workshop Act, 1901, 'as the adapting for sale of any article', nor, in my view, is it necessary for the purposes of this case to do so. The phrase was probably introduced to secure somewhat more flexibility than is to be found in the immediately preceding terms, namely, 'the altering, repairing, ornamenting or finishing of any article' . . ."

I do not think that LORD DUNEDIN could have said that if he had intended his words in the cable testing case to be universally applicable. Making an article "in itself a little different from what it was before" is simply altering it, and the introduction of the phrase "adapting for sale" would have failed to introduce any more flexibility if adapting necessarily involved such alteration.

The respondent's argument was that, if there has been no alteration of individual things, there can be no adapting for sale unless the case can be brought within the "bulk principle". This so-called principle appears to have been evolved by taking observations of LORD DUNEDIN and SCRUTTON, L.J., made in cases where the things to be adapted were "bulk" or aggregates (rags or mixed seeds) and regarding them as equally applicable where the process is the adaptation of individual things by combining them into readily saleable sets or aggregates. I see no justification for this. It would seem that the theory behind this so-called principle is that you must always have an article at the beginning of the process and the same article altered or adapted at the end. Where there is a bulk at the beginning and another bulk at the end you are entitled to regard the original bulk as persisting and merely emerging

(1) 95 J.P. 115; [1931] All E.R. Rep. 242; [1931] A.C. 450.

in a different form. This appears to me to be in many " bulk " cases nothing but a fiction. If six " bulks " of rags came in from different consignors and each is first sorted into ten different heaps and then the corresponding heaps from each bulk are mixed together for further sorting, surely the six original bulks have ceased to exist as bulks. And if a hundred bales, each different from the others, are produced at the end of the sorting process, it seems to me rather fantastic to say that any of the original bulks has continued to exist throughout the process. The individual rags have continued to exist physically unaltered but they emerge different from what they were at the beginning; they were originally parts of mixed aggregate and of little value but they are now parts of matched aggregates of much greater value.

I said a few moments ago that I would return to the rest of a quotation from the judgment of SCRUTTON, L.J.:

> " The bulk bought at one price is altered or adapted for sale into a bulk of a smaller size and different character which can be sold because of the alteration or adaptation at a much higher price. It is this principle which I think should be applied to the various cases involving sorting, which I consider separately."

That may be an adequate explanation where one bulk comes in and one goes out and it may have been sufficient for the cases he was then considering but I see no reason to deny adapting for sale in every case which it does not fit. The opinion of LORD SANDS on this matter in *Inland Revenue* v. *Easson Bros.* (1) was approved both in the Court of Appeal and in this House. He says:

> " If what had happened was that the papermaker had come into the premises saying ' I want a blue cotton rag ' or ' a piece of brown paper ', I could understand the argument that there had been no adaptation of the particular article for sale. All that had been done was to arrange the articles so as to avoid the trouble of having to rummage through the heap whenever a papermaker came in and asked for something. But that is not the condition of the problem. If one regards the whole mixed mass that comes into the works, that mass has been adapted for sale, or made saleable, by laborious assortment. If one regards the final bale, its contents have been adapted for sale by a process whereby each rag or each piece of paper, in itself worthless, has been associated with a thousand similar ones laboriously picked out."

The first of these two ways of regarding the matter may not fit the present case but the second does. If the " bulk principle " has concentrated attention on the first of these two ways then it is not, in my judgment, wide enough to comprehend all the cases where there can properly be said to have been adapting for sale.

It does not follow that every case where there is laborious picking out of similar articles will qualify as adapting for sale. In *Davis Cohen & Sons, Ltd.* v. *Hall* (2), an example was given of picking out pairs of boots from a mixed heap. I would agree that that falls far short of what is necessary. But if there had been several hundred different qualities of boots in the heap, if a lengthy process and great skill had been necessary to separate them, and if customers had required matched sets of a dozen pairs the case might well have been different. Apart from the question of manual labour, I am of opinion that in the present case there clearly was adapting for sale and, therefore, this appeal should be allowed.

(1) 1930 S.C. 480.
(2) 116 J.P. 49; [1952] 1 All E.R. 157.

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LORD TUCKER: My Lords, I agree with the opinions expressed by my noble and learned friends that the appeal should be allowed.

LORD KEITH OF AVONHOLM: My Lords, this appeal is concerned with the assessment of certain premises in the City of London belonging to the appellants, whom I shall call "the company", assessed at £15,848 gross value and £13,178 rateable value. The appeal comes to this House after unsuccessful appeals by the company to the Lands Tribunal and to the Court of Appeal against a decision of the Central London Local Valuation Court confirming the assessment. The contention of the company is that it is entitled to de-rating of its premises in whole or in part. The premises consist of three parts, known as Beaver Hall, Beaver House, and the Carpenter's Workshop respectively. In Beaver Hall, auction sales of furs, prepared for auction in Beaver House, take place. It is with Beaver House that the appeal is primarily concerned. I take the problem as stated by the Lands Tribunal:

> "It is the company's contention that Beaver House is primarily occupied and used by it for the sorting and grading of furs, that by means of that sorting and grading bales of assorted and ungraded skins sent in by trappers and breeders from various parts of the world are changed, and they are changed into saleable lots of sorted and graded skins. It may be said therefore that the real issue upon which this case will depend is whether what is done to those skins is or is not adapting for sale within the meaning of the Factory Act."

What takes place in Beaver House is set out by the Lands Tribunal in a short passage, which I shall find it necessary in a moment to amplify, as follows:

> "Bales of skins are addressed from almost all parts of the world except the Soviet Union. They arrive in lorries at the reception basement. There they are unloaded on to lifts and conveyed to the first floor where the bales are opened and are sorted according to types—the bales consist of mixed skins of various animals. The sorted bundles are then passed up to the next floor, some of the skins which may be dusty or gritty are put in drums with clean sawdust and whirled round. This eliminates the dust and grit. This process is necessary only in the case of very few, indeed almost a negligible quantity of the skins that come in. Next comes the process on which the [company] mainly rely to establish their contention that there is an adaptation for sale. The skins are passed along in trollies to the sorters' counters. The counters extend along the room which is especially lighted with artificial light and large windows. The sorters are men who have been specially trained in the art of sorting. It is said that it takes about ten years to make a man an entirely efficient sorter. The sorter takes the skin and grades it either by its feel or visual appearance. Immediately behind the sorter is a trolley with various shelves. Each shelf represents the class which the sorter assigns to the skin. These grades of skin are then conveyed to another sorting room where there are sorters who can be described as final specialists. These sorters examine the skins and either confirm the grading or up or down grade the skins again. After this final grading the skins are catalogued and passed down to the display room. There they are displayed for some days and prospective buyers come along to examine them and bid for them at the auctions which are held about three times yearly.
>
> "The skins are still in a raw state in the sense that they could not be used as furs. They have to undergo a highly technical process which

converts them from skins into saleable furs. This process is not undertaken at Beaver House. It is carried out by the furriers who buy the skins at the auction."

The evidence relating to the processes carried out in Beaver House is annexed to and forms part of the Case. And for a fuller understanding of these processes, I would expand the findings of the Lands Tribunal set out above as follows:—Beaver House may be described as a sorting establishment. But it is a sorting establishment with a very definite object. The object is to sort the skins into lots so that every skin in the lot matches every other skin in the lot so nearly that every skin may be said to be identical with every other skin. They are so identical as to be indistinguishable. It is known how many skins belonging to any consignor go into any particular lot. The price realised for any lot is divided equally among the particular consignors in proportion to the number of skins he has contributed to the particular lot, each skin being treated as of equal value with every other skin in the lot. Thus each skin in a lot may be said to have the same value, the same quality, the same colour, the same size, the same pattern, and, of course, the same class of animal. At present, the popular and largest classes of skin dealt with are Persian lamb and mink. Persian lamb is sorted first into size of curl—extra large, large, medium, small and extra small. These sizes, again, are divided into patterns or curl, of which there are a considerable number. Of one pattern, described as "A" pattern, in the highest class, it was said that out of 500,000 skins or thereby only three hundred skins of that pattern might be obtained. There are no less than 250 main grades and 880 sub-grades of Persian lamb. Of mink, again, there are no less than 468 main grades, and of beaver, sixty main grades. Persian lamb skins are graded by sight and mink by touch and the process is a highly expert job. The lots vary greatly in value according to quality, with resulting differences in prices realised at the auction. It is of prime importance to the buyer that all the skins in a particular lot are precisely matched, for they are bought to be made after processing into coats or other articles of attire. As stated in evidence:

> "It is a mammoth undertaking to equalise these lots so that every buyer knows he is going to get the same quality. That is why there are so many sub-grades; it is equalisation really."

A good sorter, it was said, would put out 1,000 to 1,500 skins a day.

This is a short resumé of the nature of the process. The result of it is that the prices obtained at auction for the furs and skins sold greatly exceed the prices that could be obtained by the producers or owners of the skins if they were sold direct to the trade in a mixed or unsorted quantity. What, in effect, happens is that producers from all over the world put their skins into a vast pool, from which a sufficient number of skins can be made up into a great number of lots of matched skins of different value and quality suitable to the requirements and demand of the fur-making trade, whether wholesale or retail. The owners of the skins do not lose the property in the skins until they are sold by auction. It would seem that they are treated as owners in common of the respective lots in proportion to the extent of their individual contribution to the lot, and share in the price realised for each lot accordingly. In the case of Persian lamb, the identity indeed of the separate skins making up a lot is lost. In the case of mink, the identity of the owners of the separate skins is, for some reason not explained, retained by a tab on each skin. But if in each case the price realised is allocated in proportion to contribution, this difference would seem to be immaterial.

The question of law raised by the Case is whether there has been such an adapting for sale of the skins that come into Beaver House as to make these premises an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928. That, again, turns on whether the premises are occupied and used as a workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920. The relevant provision is s. 149 (1) of the Factory and Workshop Act, 1901, which defines "workshop". The material words for this case are:

> "The expression 'workshop' means—. . . (b) any premises . . . not being a factory, in which premises . . . any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—. . . (iii) the adapting for sale of any article, and to or over which premises . . . the employer of the persons working therein has the right of access or control."

This section has frequently been considered in connexion with claims for derating, and your Lordships had a full citation of the relevant authorities. I find it unnecessary to consider these in any detail. None of them, in my opinion, quite touches the problem in the present case. Those which were claimed as approaching the nearest to the circumstances of the present case were *Inland Revenue* v. *Easson Bros.* (1) and *Kaye* (*Dewsbury Revenue Officer*) v. *Burrows & Dewsbury Assessment Committee* (2) (rag sorting); *Hines* (*Ipswich Revenue Officer*) v. *Eastern Counties Farmers' Co-operative Assocn., Ltd.* (3) (seed cleaning); and *Richardson & Son* v. *Middlesbrough Borough Assessment Committee* (4); and *Valuation Comr.* v. *McAllister* (5) (egg packing). I quote one passage from the judgment of SCRUTTON, L.J., as indicating the general nature of the problem:

> "In my view the question whether sorting or separation of an article to be sold from a bulk is an adapting for sale depends on the facts of each particular case, and cannot be determined simply by saying: 'no sorting is adaptation for sale'. The original bulk may be such that it cannot be sold either legally, as in mixed seeds, or commercially, because an unsorted bulk is not wanted, and the process of sorting may be so complicated and mechanical as to deserve the title of a manufacturing process, i.e., of 'adapting for sale'. On the other hand, the bulk and the article to be sold may be so similar and of such a nature, such as taking a quarter of a pound of bulls-eyes out of a bulk in a bottle, that the separation or sorting may well be regarded as an entirely minor incident of the sale or distribution."

At the risk of some repetition, I would also quote a well-known passage from the opinion of LORD SANDS in *Easson's* case (1), in part quoted and approved by VISCOUNT DUNEDIN in *Hines's* case (3) and by GREER, L.J.:

> "On the counter emptied out of the collecting carts there is a huge amorphous mass of waste paper, rags, etc., mixed with dirt and rubbish, which no paper manufacturer would look at. The workers produce a number of orderly bales in eighty different classes, which the papermakers readily buy for substantial sums. Can it reasonably be said that there has been no adaptation for sale of the mass of material which was emptied out of the

(1) 1930 S.C. 480.
(2) 95 J.P. 115; [1931] All E.R. Rep. 242; [1931] A.C. 454.
(3) 95 J.P. 115; [1931] All E.R. Rep. 242; [1931] A.C. 456.
(4) 111 J.P. 357; [1947] 1 All E.R. 884; [1947] K.B. 958.
(5) [1954] N.I. 54.

carts, and which, so far as not discarded as dirt or rubbish, is now arranged in orderly merchantable bales? I understand the argument to be that, if you look at one particular rag or one particular scrap of paper, that rag or that scrap of paper has not been subjected to any treatment which alters it or adapts it for sale. As it appears to me, this is an altogether artificial and superficial argument. The papermaker is not buying one rag or one piece of waste paper; he is buying a bale. If what had happened was that the papermaker had come into the premises saying 'I want a blue cotton rag' or 'a piece of brown paper', I could understand the argument that there had been no adaptation of the particular article for sale. All that had been done was to arrange the articles so as to avoid the trouble of having to rummage through the heap whenever a papermaker came in and asked for something. But that is not the condition of the problem. If one regards the whole mixed mass that comes into the works, that mass has been adapted for sale, or made saleable, by laborious assortment. If one regards the final bale, its contents have been adapted for sale by a process whereby each rag or piece of paper, in itself worthless, has been associated with a thousand similar ones laboriously picked out."

The last sentence in this passage is not in the excerpt quoted by LORD DUNEDIN and GREER, L.J., but it has, I think, a significant relevance to the facts of this case.

My Lords, the view of the Lands Tribunal is expressed in the following passages, which are expressly challenged by counsel for the company as being inadequately supported by the evidence in the case:

"(A) 'I put it this way—without the sorting and grading the buyer, unless he were himself an expert, would be taking a risk but the skins are still saleable . . . the conclusion I have come to is that the only effect of the sorting and grading was to certify that the skins were of such a quality as to merit being placed in the category in which they appear in the auction catalogue.'

"(B) 'What is emptied out of the bales that come into the Hudson's Bay Co. is not a huge amorphous mass. It is a bundle of easily identifiable individual skins. They are sent in bundles merely for the convenience of despatch. It is not like the rag case or the seed case in that it is not what has come to be known as a "bulk" case at all. It is not the intention that the skins should be made into a bulk and sold as a bulk. Each skin is sent to the Hudson's Bay Co. to be sold as a skin, in fact the owner might send only one skin although admittedly this would be unusual. It is also bought as a single skin although the bidder bids for a lot that are matched. In a word selling in lots is only for the convenience of the buyer.'

"(C) 'All that has been done here was to arrange the skins.'

"In my view the process carried out in Beaver House, highly technical as I concede it is, is merely an identification of skins and their arrangement in price classes for sale. Nothing has been done to any skin which in any way makes it a little different to what it was before—I ignore the cleaning of the skins in the drum because it applied to a negligible number of the skins dealt with in Beaver House. There has therefore been no adapting for sale."

The grounds on which the Court of Appeal upheld the findings of the Lands Tribunal would appear to be contained in the following passage:

"If on the facts the articles to be sold could properly be regarded as a bulk of sorted, matched and graded skins produced by these operations

from an aggregate of unsorted, unmatched and ungraded skins, then there would be much to be said for the view that there was here an adapting of the skins for sale on the principle of the various 'bulk' cases already quoted. But we cannot regard this as a 'bulk' case. We think that the article to be sold must on the facts consist of each individual skin belonging to each intending vendor. Each parcel delivered at the hereditament for sale comprises individual skins of the number and types particularised in the invoice, and each of those skins is marked as the property of the intending vendor and thenceforth dealt with as such. The auctioneer employed by the [company] when he sells each lot at so much per skin must be taken as selling each individual skin comprised in it as agent for and on behalf of the vendor to whom it belongs. We do not see how this can be treated as a 'bulk' case consistently with the system of sale in fact adopted. It is of the essence of the 'bulk' principle that the components of the bulk should lose their identity in the bulk, so that the bulk and not its individual components can properly be regarded as the article to be sold. That is plainly impossible here. The whole system of sale depends on the identity and ownership of individual skins being preserved. The elaborate system of sorting, matching and grading enables each individual skin to be sold to the best advantage as part of a uniform lot, but we cannot regard it as an adapting for sale."

My Lords, I would accept it that this is not what is generally understood as a "bulk" case. What comes in is a large collection of parcels of individual skins from a large number of owners who wish their skins to be sold by the methods known to be adopted by the company. They retain throughout the ownership of their skins until sale, and the company is their agent to prepare these skins for sale. The skins are dealt with individually in the sense that they are picked out individually from their respective parcels, matched with other skins for fineness, quality, colour, size and pattern and put into lots for sale as lots in which each individual component of the lot is practically indistinguishable from its fellows. This results in an enhanced price for the individual skins which would otherwise be quite unobtainable. I have come to the view that, in spite of the individual treatment accorded to each skin and the fact that each skin may be said to be the subject of sale though only as an item in a lot which must be bought as a whole, there is here an adaptation for sale. It was contended that this would go contrary to the dictum of LORD DUNEDIN in *Grove (Dudley Revenue Officer)* v. *Lloyd's British Testing Co., Ltd.* (1):

> "I think 'adapting for sale' points clearly to something being done to the article in question which, in some way, makes it in itself a little different from what it was before."

In my view, this must not be read too narrowly. The process here has enhanced the value of each individual skin and that is a change of a peculiar and unusual character. With the poet it may be said that each skin has suffered

> "... a sea change
> Into something rich and strange."

The process by which this has been done may well be described in the words of the witness already quoted as "a mammoth undertaking", though the process may be the easily understood one of selection and arranging. In the rag picking case (2), different as it is, LORD SANDS used words with reference to

(1) 95 J.P. 115; [1931] All E.R. Rep. 242; [1931] A.C. 450.
(2) 95 J.P. 115; [1931] All E.R. Rep. 242; [1931] A.C. 454.

the process which might easily be adapted here: " The papermaker is not buying one rag or one piece of waste paper, he is buying a bale." Here the buyer is not buying one skin, he is buying a lot of matched skins.

> " If one regards the whole mixed mass that comes into the works, that mass has been adapted for sale, or made saleable, by laborious assortment."

Here, if one regards the collection of parcels of unmatched skins that come into Beaver House, that collection had been adapted for sale, or made saleable, by laborious assortment. Or again, in the words of LORD SANDS, at the end of the passage already quoted, the skins

> " have been adapted for sale by a process whereby each . . . has been associated with a thousand similar ones laboriously picked out."

Though this is not, in my opinion, a " bulk " case, it has many similarities to such a case. The Lands Tribunal was, I think, wrong in regarding the sorting and grading of the skins as a mere certificate of quality, or a mere arrangement of the skins. And the Court of Appeal, I think, went wrong in regarding the individuality of the skins and their continuing ownership until sale as a conclusive factor for refusing de-rating.

In the peculiar circumstances of this particular trade, I am prepared to hold that there was an adapting for sale. I would, accordingly, allow the appeal.

LORD DENNING: My Lords, the question whether premises are a " workshop " depends, to my mind, on the nature of the work that is carried on therein. It does not depend on the ownership of the articles which are worked on, nor on the contracts that are made in regard to them. And it is not to be solved, I think, by asking whether the articles come in or go out in bulk. It is to be solved by asking two questions: (i) What is the purpose of the work being done ? (ii) How is that purpose being achieved ? You must find the purpose to be one of three: Put shortly, these are (i) the making of any article or articles, (ii) the altering of them, (iii) the " adapting " of them " for sale ". And you must find that the purpose is achieved " by means of manual labour " that is exercised by way of trade or for purposes of gain.

I ask myself, therefore, first, what was the purpose of the work done on these skins ? It was, I think, clearly the adapting of them for sale. When they came into Beaver House, they were mixed up in bales containing skins of much variety. They varied according to the kind of animal, the place of origin, the size of skin, the length of hair, the thickness and density of fur, colour, pattern and durability. These skins, as mixed up, were virtually unsaleable in the London market. The work that was done on them consisted in splitting up the bales into the component skins, sorting them, grading them, matching them, and eventually making them up into lots in which each skin was the same as every other. As such, they were readily saleable in the London market. If it were a question of putting these skins into categories according to " bulk ", I must say that I would not myself put these skins into the same category as heaps of waste paper, sacks of seeds or piles of stones—where it may truly be said that the identity of each particle is lost in the mass. I would put these skins more in the category of eggs which come in for grading, or sweets which have to be packed attractively in boxes—where each item retains its identity and has to be handled individually. But I do not find these categories to be of much help. No matter whether you consider the articles to be an amorphous mass or to be a group of items, you have still to answer the same question, what is the purpose of the work being done on them ?

Are they being adapted for sale? The answer in the case of these skins is clearly "Yes". They are being adapted for sale. So the first question must be answered in favour of the appellants.

But there still remains the second question: How is this purpose being achieved? Is it by means of manual labour? This question is not left to your Lordships by the Case Stated. The facts relating to it have not been found. The arguments for and against have not been put before your Lordships. The case must go back to the Lands Tribunal for the question to be determined.

I would allow the appeal accordingly.

Appeal allowed.

Solicitors: *Linklaters & Paines*; *Solicitor of Inland Revenue.*

G.F.L.B.

COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., BYRNE AND WINN, JJ.)

June 8, 1959

R. *v.* BAINBRIDGE

Criminal Law—Accessory before the fact—Knowledge required to be proved—Knowledge of type of crime essential—Knowledge of precise crime unnecessary.

On a charge of being accessory before the fact to felony it must be proved that the prisoner knew that there was an intention to commit the type of crime which was in fact committed, but it is not necessary to prove that he knew of the intention to commit the precise crime or of its date or place. It is not sufficient to prove merely that he knew that some crime was intended.

APPEAL against conviction.

The appellant was convicted at the Central Criminal Court before the Commissioner (Judge AARVOLD) of being accessory before the fact to office breaking and larceny and was sentenced to four years' imprisonment. Oxygen cutting equipment used by thieves for breaking into a bank had been bought for them, some six weeks earlier, by the appellant, and the case against him was that he had bought the cutting equipment on behalf of the thieves with full knowledge that it was to be used for breaking and entering premises. He admitted that he had suspected that the equipment was required for something illegal, i.e., breaking up stolen goods, but he denied having any knowledge that the equipment would be used for any such purpose as that for which it was used. In his summing-up the judge said that, as well as proving that the felony itself had been committed, the prosecution had to prove (i) that the appellant knew that a felony of that kind (breaking and entering premises and stealing property from the premises) was intended, and that it was not enough that he should have known merely that some crime was going to be committed; and (ii) that with that knowledge he did something to help the felons commit a felony of the kind that in fact was committed, but knowledge of the precise crime (i.e., that the particular bank was going to be broken and entered) did not have to be proved.

R. M. G. Simpson for the appellant.

J. M. G. Griffith-Jones for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant in this case was convicted at the Central Criminal Court of being accessory before the fact to office-breaking and was sentenced to four years' imprisonment. He now appeals against his conviction only on a point of law.

The facts were these. On the night of Oct. 30, 1958, the Stoke Newington branch of the Midland Bank was broken into by cutting the bars of a window, the doors of the strong room and of a safe inside the strong room. They were opened by means of oxygen cutting equipment and nearly £18,000 was stolen. The cutting equipment was all left behind, and it was later found that that cutting equipment so left behind by the thieves had been purchased by the appellant some six weeks earlier. The case against him was that he had bought this cutting equipment on behalf of one or more of the thieves with the full knowledge that it was going to be used, if not against the Stoke Newington branch of the Midland Bank, at any rate for the purposes of breaking and entering premises. The appellant's case, as given in his evidence, was this: "True, I had bought this equipment from two different firms. I had gone there with a man called Shakeshaft to buy it for him. As a result of conversation which I had with him, I was suspicious that he wanted it for something illegal. I thought it was for breaking up stolen goods which Shakeshaft had received, and, as the result, in making those purchases I gave false names and addresses; but I had no knowledge that the equipment was going to be used for any such purpose as that for which it was used".

The complaint here is that JUDGE AARVOLD, who tried the case, gave the jury a wrong direction in regard to what it was necessary for them to be satisfied of in order to hold the appellant guilty of being an accessory before the fact. The passages in question are these:

> "To prove that, the prosecution have to prove these matters: first of all, they have to prove that the felony itself was committed. Of that there is no doubt. That is not contested. Secondly, they have to prove that the [appellant] knew that a felony of that kind was intended and was going to be committed, and with that knowledge he did something to help the felons commit the crime. The knowledge that is required to be proved in the mind of [the appellant] is not the knowledge of the precise crime. In other words, it need not be proved that he knew that the Midland Bank, Stoke Newington branch, was going to be broken and entered, and money stolen from that particular bank, but he must know the type of crime that was in fact committed. In this case it is a breaking and entering of premises and the stealing of property from those premises. It must be proved that he knew that that sort of crime was intended and was going to be committed. It is not enough to show that he either suspected or knew that some crime was going to be committed, some crime which might have been a breaking and entering or might have been disposing of stolen property or anything of that kind. That is not enough. It must be proved that he knew that the type of crime which was in fact committed was intended."

There are other passages to the same effect; in particular, when the jury returned for further directions before they came to their verdict, the learned judge said this:

> "If in fact, before it has happened, [the appellant], knowing what is going to happen, with full knowledge that a felony of that kind is going to take place, deliberately and wilfully helps it on its way, he is an accessory . . . If he was not present he would not be guilty as a principal, but then you would have to decide whether he helped in purchasing this equipment for

Shakeshaft knowing full well the type of offence for which it was going to be used, and, with that knowledge, buying it and helping in that way.

Counsel for the appellant, who argued this case very well, contended that that direction was wrong. As he put it, in order that a person should be convicted of being accessory before the fact, it must be shown that, at the time when he bought the equipment in a case such as this, he knew that a particular crime was going to be committed; and by "a particular crime" counsel meant that the premises in this case which were going to be broken into were known to the appellant and contemplated by him, and not only the premises in question but the date when the crime was going to occur; in other words, that he must have known that on a particular date the Stoke Newington branch of the Midland Bank was intended to be broken into.

The court fully appreciates that it is not enough that it should be shown that a person knew that some illegal venture was intended. To take this case, it would not be enough if the appellant knew—he says that he only suspected—that the equipment was going to be used to dispose of stolen property. That would not be enough. Equally, this court is quite satisfied that it is unnecessary that knowledge of the intention to commit the particular crime which was in fact committed should be shown, and by "particular crime" I am using the words in the same way as that in which counsel for the appellant used them, namely, on a particular date and particular premises.

It is not altogether easy to lay down a precise form of words which will cover every case that can be contemplated, but, having considered the cases and the law, this court is quite clear that the direction of JUDGE AARVOLD in this case cannot be criticised. Indeed, it might well have been made with the passage in FOSTER'S CROWN CASES (3rd Edn.) (1792) at p. 369 in mind, because there the learned author says:

> "If the principal totally and substantially varieth, if being solicited to commit a felony of one kind he *wilfully and knowingly* committeth a felony of another, *he* will stand single in that offence, and the person soliciting will not be involved in his guilt. For on *his* part it was no more than a fruitless ineffectual temptation."

The converse of course is that, if the principal does not totally and substantially vary the advice or the help and does not wilfully and knowingly commit a different form of felony altogether, the man who has advised or helped, aided or abetted, will be guilty as an accessory before the fact.

JUDGE AARVOLD in this case, in the passages to which I have referred, makes it clear that there must be not merely suspicion but knowledge that a crime of the type in question was intended, and that the equipment was bought with that in view. In his reference to the felony of the type intended it was, as he states, the felony of breaking and entering premises and the stealing of property from those premises. The court can see nothing wrong in that direction.

Appeal dismissed.

Solicitors: *L. Dawson & Co.*; *Director of Public Prosecutions.*

T.R.F.B.

COURT OF APPEAL

(LORD EVERSHED, M.R., ROMER AND PEARCE, L.JJ.)

June 15, 1959

Re HASTINGS

Habeas Corpus—Appeal—Criminal cause or matter—Allegation that unlawfully incarcerated under sentence of criminal court—No jurisdiction—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *and* 16 *Geo.* 5 *c.* 49), *s.* 31 (1) (*a*).

The question whether a person is rightly incarcerated under the sentence of a criminal court is a criminal cause or matter within s. 31 (1) (a) of the Supreme Court of Judicature (Consolidation) Act, 1925, and, therefore, no appeal lies in such a case from the decision of a Divisional Court refusing a writ of habeas corpus.

APPEAL by the applicant, Edward Thomas Hastings, from a decision of a Divisional Court of the Chancery Division (VAISEY and HARMAN, JJ.), dismissing his application for a writ of habeas corpus directed to the Secretary of State for Home Affairs and the governor of Durham Prison, the applicant being then detained in Durham Prison undergoing a sentence of four years' corrective training. The Divisional Court of the Chancery Division held that it had no jurisdiction to entertain the application as the matter had already been decided by a Divisional Court of the Queen's Bench Division: see 122 J.P. 283. Before the Court of Appeal the SOLICITOR-GENERAL, for the respondents, took the preliminary point that no appeal lay as this was a criminal cause or matter within s. 31 (1) (a) of the Supreme Court of Judicature (Consolidation) Act, 1925.

The applicant in person.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*) and *Cumming-Bruce* for the respondents.

LORD EVERSHED, M.R.: The appellant in this court, Edward Thomas Hastings (referred to hereinafter as "the applicant") was convicted in July, 1957, in the Crown Court at Liverpool on all counts of an indictment containing five counts. The first count was for alleged felony and the second to the fifth counts, inclusive, were for misdemeanours. After he was convicted on all five counts, the sentence imposed on him was: "four years' corrective training". The sentence contained no reference to any particular charge, nor was it expressly stated whether the four years' corrective training was intended to be concurrent on each count. The applicant appealed to the Court of Criminal Appeal by leave and he succeeded in getting the conviction on the first count for felony quashed. He had also appealed on the second and third counts, but in those respects he failed.

The next step was that in March, 1958, the applicant applied for an order for a writ of habeas corpus ad subjiciendum to a Divisional Court of the Queen's Bench Division over which LORD GODDARD, C.J., presided. The applicant's point was that the four years' corrective training should be related exclusively to the charge of felony, which had now been quashed, and that, therefore, there was no effective sentence outstanding against him and he was entitled to be released. The Divisional Court rejected that view, holding that in the circumstances the sentence of four years' corrective training must be treated as having been concurrent in respect of all the counts, so that the quashing of the conviction on the first count for felony left the sentence of four years' corrective training outstanding and effective in respect of the second to the fifth counts respectively.

From that decision of the Divisional Court the applicant sought to appeal to this court, and I have before me the judgment of this court delivered on July 28, 1958. On that occasion the applicant was represented by leading counsel, and the respondents were represented by the Solicitor-General and two other counsel. A preliminary objection was taken by the Solicitor-General that no appeal lay on this matter to this court, having regard to the language of s. 31 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which says:

> "No appeal shall lie—(a) except as provided by the Criminal Appeal Act, 1907, or this Act, from any judgment of the High Court in any criminal cause or matter . . ."

This court pointed out that no question arose out of the exceptions (that is, the references to the Criminal Appeal Act, 1907, or to the Act of 1925 itself), so that the single point for decision was whether the applicant's attempted appeal was, or would (if entertained) be, an appeal in a criminal cause or matter. The members of this court then sitting referred to *Ex p. Woodhall* (1), *R.* v. *Maidstone Prison (Governor)*, *Ex p. Maguire* (2), and *Amand* v. *Secretary of State for Home Affairs* (3), a decision of the House of Lords. The court pointed out that the first two decisions which I have mentioned were decisions under s. 47 of the Supreme Court of Judicature Act, 1873, although they observed that the material statutory language did not differ, and also that the two decisions had been approved in cases decided since 1925. *Amand* v. *Secretary of State for Home Affairs* (3) was, of course, a decision after the Act of 1925 had been passed. I do not propose to refer at length to the judgment of this court in the applicant's earlier appeal or to citations from the three authorities which I have mentioned. It is sufficient to say that this court clearly took the view that an application for an order of habeas corpus ad subjiciendum in a case such as this could not be regarded as sufficiently distinct from the original proceeding, namely, his trial and conviction at the Crown Court at Liverpool, to enable him to say that the application was not in a criminal cause or matter; and it followed from that, they held, that no appeal lay to this court.

Since that judgment two other events have occurred. In the first place the applicant made another original application for an order for a writ of habeas corpus to another Divisional Court of the Queen's Bench Division, in this instance presided over by LORD PARKER, C.J., the other members of the court also being different from those who constituted the court over which LORD GODDARD, C.J., presided in March, 1958. It was suggested on the applicant's behalf that he could go from judge to judge, or from groups of judges to groups of judges, until he had exhausted the entire personnel of the Queen's Bench Division. But the Divisional Court rejected that view, holding that, if on a matter of this kind a Divisional Court of the Queen's Bench Division, properly constituted, had dealt with an application for habeas corpus, it must be treated as speaking for all the judges of the Queen's Bench Division. The court did not, however, go on to say anything about the jurisdiction of judges of other Divisional Courts, and, encouraged thereby, the applicant then proceeded, in March, 1959, to apply to the Chancery Division for the same order of habeas corpus based on the identical contentions which he had put forward before the original Queen's Bench Divisional Court.

There was some preliminary difficulty about the constitution in the Chancery Division of a Divisional Court at all, but that difficulty was successfully overcome, so that the matter was heard before VAISEY, J., and HARMAN, J., sitting as

(1) (1888), 52 J.P. 581; 20 Q.B.D. 832.
(2) (1925), 95 L.J.K.B. 55.
(3) [1942] 2 All E.R. 381; [1943] A.C. 147.

a Divisional Court of the Chancery Division. They took the view that, since the Supreme Court of Judicature Act, 1873, the Chancery Court, as it was previously called, was no longer a separate court, and that the judges of the Chancery Division were, no less than the judges of the Queen's Bench Division, or of the Probate, Divorce and Admiralty Division, judges of the High Court; from which it followed that, if the Divisional Court, presided over by LORD GODDARD, C.J., on the original application had spoken for the Queen's Bench Division, it must also be taken to have spoken for the personnel of the High Court as a whole and as a single entity. The preliminary objection having been taken by the Solicitor-General, the order made was, in terms, that the motion do stand dismissed out of this court.

The applicant now appeals to this court, and the question, therefore, arises once again on the objection taken by the Solicitor-General: Is this appeal, if we entertain it, an appeal in a criminal cause or matter? There is obviously only one matter of distinction between the case as it now comes before us and the case as it came before this court a year ago. The applicant says that the Divisional Court of the Chancery Division wrongly took the view that the judgment of the first Divisional Court of the Queen's Bench Division spoke for the entire High Court, and that, accordingly, he was entitled to have his case reheard by a Divisional Court of the Chancery Division. Even if it is assumed, however, that that argument is well founded, it seems quite plain that, none the less, this present appeal, if entertained, would be an appeal in a criminal cause or matter. The essential subject-matter which is raised by the application (from the judgment on which the applicant now seeks to appeal) is the question whether in the circumstances he is rightly incarcerated in prison; and that challenges the validity of the view of the first Divisional Court, in March, 1958, that the four years' corrective training must be treated as having been concurrent on all the charges, which, in turn, inevitably links the present application with the original proceedings when the conviction was entered. It seems to me that there can be no escape from that conclusion. In *Ex p. Woodhall* (1) it was said that the words " criminal cause or matter " must be given a very wide significance, and in that case the question was put whether it could be said that the question now sought to be raised was in, or with regard to, proceedings the subject-matter of which was criminal. No doubt, that formula should not be carried to extreme lengths.

The applicant referred to *Auten* v. *Rayner* (2), a decision of this court. The question there was whether the Home Secretary had been entitled to make a determination preventing or refusing the production by police officers, on discovery in a civil action, of certain police records. The applicant said that to some extent those police records were related to quite different criminal proceedings. It seems quite plain that the appeal to this court in *Auten* v. *Rayner* (2), which was concerned with discovery, could not fairly be said to be in regard to the criminal proceedings to which certain of the records related or might have related. But in the present case the link between the original criminal proceedings and the present application is far closer and is, as I think, incapable of severance. The applicant is seeking to challenge the effect of what transpired in July, 1957, when he was convicted of the charges which I have mentioned and as to four of which he still remains convicted. In my judgment, the further point whether, once a Divisional Court has refused an application, that concludes

(1) (1888), 52 J.P. 581; 20 Q.B.D. 832.
(2) 123 J.P. 124; [1958] 3 All E.R. 566.

the matter and prevents him making the identical application to other judges of the High Court, does not suffice to distinguish this case from the conclusion of this court pronounced on July 28, 1958, and I am, therefore, clear that the preliminary objection taken by the Solicitor-General must be sustained. In the terms of s. 31 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, we have no jurisdiction to entertain this appeal.

ROMER, L.J.: I entirely agree with LORD EVERSHED, M.R.

PEARCE, L.J.: I also entirely agree with what my Lord has said.

Appeal dismissed.

Solicitor: *Treasury Solicitor.*

F.G.

COURT OF APPEAL

(LORD EVERSHED, M.R., ROMER AND SELLERS, L.JJ.)

July 16, 28, 1959

IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND), LTD *v.* PIERSON (VALUATION OFFICER)

Rates—Valuation—Advertising station—Right to fix and exhibit advertising sign to be erected by the grantee—Local Government Act, 1948 (11 & 12 *Geo.* 6 *c.* 26), *s.* 56.

By an agreement made on June 21, 1955, a local authority granted to the ratepayers for three years the exclusive rights of fixing and exhibiting on premises of the authority "a flashing neon advertising sign reading 'Players, please' to be erected in [a specified position] and to be operated by an automatic time switch", together with the right to connect the sign to the electricity supply and "to erect and maintain a permanent scaffold and iron ladder". The ratepayers were given the right to enter on the premises to make the necessary fixtures and do other things for making the sign effective and to repair and maintain the apparatus, and they undertook to keep and maintain the sign securely fixed and in good and substantial repair. They remained the owners of the sign and apparatus and were to remove them on the determination of the agreement. By a proposal for the alteration of the valuation list made on Apr. 12, 1956, the valuation officer proposed to assess the right at £165 rateable value under s. 56 of the Local Government Act, 1948, on the basis that at that date the right enjoyed was the right to use the authority's premises and the neon sign and frame by then erected under the agreement. The Lands Tribunal held that the assessment should be £150 rateable value on the basis that the right conferred on the ratepayers was the right to use the premises and a sign to be erected, but not then erected. On appeal, it was conceded that the neon sign and frame erected were a structure within the meaning of s. 56 of the Act of 1948.

HELD: the right which was deemed by s. 56 of the Local Government Act, 1948, to be a separate hereditament for rating purposes must be ascertained according to the true construction of the agreement of June 26, 1955; the right thereunder was to use the whole structure that had been erected by Apr. 12, 1956 (which was the relevant date at which to determine what the right was); and, therefore, the rateable value of the hereditament was £165.

CASE STATED by the Lands Tribunal.

The respondent ratepayers were the grantees under an agreement of June 21, 1955, of an exclusive right of fixing and exhibiting on premises of Bradford Corporation at the junction of Forster Square, Canal Road and Bolton Road,

Bradford, a flashing neon advertising sign reading "Players please" which was assessed at £165 rateable value as an "advertising right" under s. 56 of the Local Government Act, 1948. On Apr. 12, 1956, they made a proposal for the alteration of the valuation list for Bradford City by reducing the assessment to £150 rateable value, and on Sept. 13, 1957, their appeal against the valuation officer's objection to the proposal was dismissed by a local valuation court of West Riding of Yorkshire (North) Local Valuation Panel. On Aug. 1, 1958, the Lands Tribunal (ERSKINE SIMES, Esq., Q.C.) allowed their appeal against this decision and reduced the assessment to £150 rateable value. The valuation officer appealed to the Court of Appeal. His grounds of appeal were that the tribunal was wrong in law in refusing to take into account work done (in affixing the sign, frame, etc., on the premises) after June 21, 1955, in arriving at the rateable value of the hereditament and that it was bound to take such work into account on the true construction of s. 56 of the Local Government Act, 1948, and s. 22 (1) (b) of the Rating and Valuation Act, 1925; that the tribunal wrongly failed to take into account as affecting the rateable value of the hereditament circumstances as they stood at the date of the ratepayers' proposal; that it was wrong in law in holding that the hereditament consisted only in "the right to exhibit advertisements on a structure to be erected" and that on a true construction of the agreement of June 21, 1955, the hereditament also included the right to use the structure and exhibit advertisements on it after it was erected.

Harold Williams, *Q.C.*, and *G. F. P. Mason* for the ratepayers.
Lyell, *Q.C.*, and *J. R. Phillips* for the valuation officer.

Cur. adv. vult.

July 28. The following judgments were read.

LORD EVERSHED, M.R.: By an agreement dated June 21, 1955, between the lord mayor, aldermen and citizens of the City of Bradford, the corporation, and the Imperial Tobacco Co. (of Great Britain and Ireland), Ltd., the ratepayers by their authorised agents, it was provided as follows: The corporation agreed

> "to grant to the [ratepayers] the exclusive rights of fixing and exhibiting upon the premises of the corporation at the junction of Forster Square Canal Road and Bolton Road in the City of Bradford (hereinafter called 'the said premises') a flashing neon advertising sign reading 'Players please' to be erected in the position shown in the rectophot attached hereto and to be operated by an automatic time switch Together with all necessary rights (a) to connect such sign to the switchboard and meters and to the main electric cable in the street (b) to erect and maintain a permanent scaffold and iron ladder."

Clause 2 provided for the corporation giving to the ratepayers liberty to enter on the premises to make the necessary fixtures, etc., and do other things necessary for making the sign effective, with liberty to enter for repairing and maintaining the apparatus. Clause 4 provided:

> "The corporation will immediately inform the [ratepayers] in the event of the sign requiring attention or needing repair and the [ratepayers] will keep and maintain the same securely fixed and in good and substantial repair to the satisfaction of the corporation."

By cl. 5, the corporation was to pay rates and taxes payable in respect of the said premises, and the ratepayers were to pay any rates which might be imposed solely on the said sign. Clause 9 provided that the agreement should remain

in existence for a term of three years certain and thereafter as contained in that clause. Clause 11 provided:

> "Upon the determination of this agreement the said sign and the apparatus used in connexion therewith shall remain the property of the [ratepayers] who shall remove the same within fourteen days and make good any damage done to the said premises in consequence of such removal."

It is conceded that the ratepayers are properly rateable in respect of the "right" or "rights" which they obtained by the agreement, and which, for the purposes of s. 56 of the Local Government Act, 1948, are to be treated as a "rateable hereditament". Section 56 is in the following terms:

> "Where the right to use any land (including any hoarding, frame, post, wall or structure erected or to be erected on the land, and including also any wall or other part of a building) for the purpose of exhibiting advertisements is let out or reserved to any person other than the occupier of the land, or, when the land is not occupied for any other purpose, to any person other than the owner of the land, that right shall be deemed for rating purposes to be a separate hereditament in the occupation of the person for the time being entitled to the right, and shall be included in the valuation list as a separate hereditament accordingly, and, notwithstanding anything in s. 3 or s. 4 of the Advertising Stations (Rating) Act, 1889, in estimating the value of the land for rating purposes no account shall be taken of any value or, as the case may be, of any increased value arising from the use of the land for the purpose of exhibiting advertisements in accordance with that right."

The decision of the Lands Tribunal contained the following passage:

> "There is no dispute that the hereditament is properly described and entered in the valuation list, nor that its rateable value is to be ascertained under s. 22 (1) (b) of the Rating and Valuation Act, 1925. The question in dispute is whether the value to be ascertained is that of a right to exhibit advertisements *on a structure to be erected* on the land at the expense of the grantee, the right in fact conferred on the [ratepayers] by an agreement dated June 21, 1955, or that of a right to exhibit advertisements on *a structure erected* on the land, which was the position at the date of the proposal, Apr. 12, 1956. It is agreed between the parties that in the former case the rateable value should be £150, in the latter case £165."

I am not entirely clear whether counsel for the ratepayers is prepared to concede that the question was properly stated in the passage that I have quoted, but he was prepared to argue on the footing that it was correctly stated. If so, the question is, What is the "right" that here is to be treated as the rateable hereditament; and the answer depends on the interpretation and effect of the agreement which I have read.

No doubt the question must be asked and answered as on the date of the proposal, viz., Apr. 12, 1956; but the case of counsel for the ratepayers is that the right on that date is the same as that which was conferred on June 21, 1955, by the agreement, and is not (for present purposes, at any rate) to be enhanced by the fact of, or in consequence of, anything done by the ratepayers in the course of the existence of the right. So it was and is said by counsel for the ratepayers, and his argument is accepted by the tribunal, that the right is and was limited to exhibition of advertisements on the structure *to be erected*, and is not and has not become a right to exhibit on a structure *when erected*. It is to be noted that counsel for the ratepayers in his argument was prepared to assume (and he

expressly so conceded here and before the tribunal) that the word " structure " meant or included the actual physical framework and sign or lettering " Players please ". To this I shall return later.

But once the assumption to which I have referred is made, then, although I confess that I have felt greater difficulty than my brethren, I have in the end felt compelled (albeit with some reluctance and subject to what I say at the end of this judgment) to a conclusion different from that of the tribunal, i.e., that " right " must include the right to exhibit on or by means of the structure when erected and expressed as " to be erected " in that agreement.

I refer particularly to cl. 4 of the agreement containing the obligation of the ratepayers to maintain the sign and apparatus when erected. The point is very short and not, I think, capable of elaboration; and I have not thought it useful or necessary to refer to the Act of 1889, mentioned in s. 56 of the Act of 1948, and now superseded, so far as this case is concerned, by the latter section.

I desire, however, to add the following observations. As I have said, it was clearly conceded for the purposes of this case that the framework and sign, " Players please ", were when erected, a " structure " within the meaning of s. 56; i.e., that the word " land " in the section, when expanded by the definition in the parenthesis, includes in this case the physical apparatus plus the sign itself above-mentioned. This concession having been made, it has seemed, in the end, to me that the result indicated must follow, since the rights acquired by the ratepayers must at least include the right to use the apparatus and the sign when erected.

I am not, of course, saying that the concession was wrongly made; but since we were told that this was in the nature of a test case, I am venturing to suggest that for the purposes of other cases the matter should be further considered. I emphasise the words—highly significant as they seem to me—in the third line of the section (and later repeated), " for the purposes of exhibiting advertisements "—not, be it observed, " for the purposes of advertising ". It was said by counsel for the valuation officer in this case that the " exhibition " of the advertisement consists of the use of the neon lights inside the frame of the sign, which, when in use, " exhibit " the advertisement, viz., " Players please "; and he pointed out that the cost of the neon light was not included in the calculation which resulted in the figure of £165.

I confess for my part that I have felt and continue to feel uneasy on this matter. Judged by ordinary standards of language, there is surely much to be said (to say the least) for the view that it is the physical thing, the flashing neon sign, frame, letters, lights, the whole apparatus, that is the advertisement, and that the right acquired was to use the corporation's wall for the purpose of fixing and thereafter exhibiting that advertisement on it. References to words like " hoarding " and " structure ", in parenthesis, would naturally cover cases where the hoarding or structure already existed and belongs to the occupant of the land, who then grants to the advertiser the right to use the hoarding or structure for exhibiting his advertisement. There might obviously be a case where there is a distinction between the actual sign or advertisement and the frame to which it is fixed; but no such distinction, as I understand, is made in the present case; and I note that when the agreement comes to an end, the frame, sign and all are the property of the ratepayers, who must remove the lot.

This suggested view is at least supported by the terms of the agreement whereby the ratepayers were granted the right of " fixing and exhibiting on the premises of the corporation a flashing neon advertising sign " of a specified kind, and not—in terms, at any rate—a right to use the wall and any structure

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erected or to be erected thereon for the *purposes of advertisement*, which, as I have indicated above, I should have thought the more natural phrase on the basis assumed. No doubt, in the ordinary case, anything fixed to a building becomes part of the building; but the concession here made seems to involve the assumption that the "premises" mentioned in the agreement are different after the sign is fixed from what they were before—in spite of the provision that at the end of the agreement the apparatus and sign are the property of the ratepayers and must be removed by them.

Put otherwise, I venture to suggest that there is something to be said for the view that the formula in brackets in the section only means that land covers whatever is there or is to be put there as a wall, structure or otherwise, as part of the grantor's property, but does not include something (albeit in some sense a structure) added by the grantee temporarily as a means of exercising the right granted, and intended to be removed by the grantee when the grant determines.

Nevertheless, for the reasons which I have earlier stated, I have come to the conclusion that the appeal in this case should be allowed.

ROMER, L.J.: It seems to me that the decision on this appeal depends on the answer to two questions. The first question is: What right was vested in the ratepayers on Apr. 12, 1956, under and by virtue of their agreement with Bradford Corporation dated June 21, 1955? The second question is: What is the effect of s. 56 of the Local Government Act, 1948, on that right?

The answer to the first of these questions can only be found from the terms of the agreement itself. If, on the true construction of the agreement, all that was vested in the ratepayers on Apr. 12, 1956, was the abstract right of using the corporation's land (including a structure to be erected on the land) for the purpose of exhibiting advertisements, then the present appeal fails. If, on the other hand, the ratepayers had, at the relevant date, the right to use for exhibiting advertisements a structure which had by then already been erected on the land, the appeal succeeds.

Immediately after the agreement had been signed, it is clear that the ratepayers had no right to use a structure erected on the corporation's land, for no such structure existed. It seems to me quite plain, however, as an irresistible inference arising from the terms of the agreement, that, once the structure contemplated by the agreement had been erected, the ratepayers were to be entitled to use it for advertising purposes for so long as the agreement remained on foot. This is clear enough from cl. 1 of the agreement, even if taken by itself. The point, however, ceases to be arguable when one finds that under cl. 2 the ratepayers were given

> "liberty at all reasonable times to enter the said premises for the purpose of repairing renewing inspecting and testing the said sign and electric fittings and of doing all work necessary for maintaining the same in a state of efficiency";

and see also cl. 4.

Counsel for the ratepayers concedes that the "flashing neon advertising sign reading 'Players please'" referred to in the agreement is a structure within the meaning of, and for the purposes of, s. 56 of the Act of 1948. To be taken in conjunction with this concession are the facts that the sign had been erected by the ratepayers prior to Apr. 12, 1956; that they had a contractual right on that date, as I have already indicated, to use it; and that they were in fact using it.

Applying s. 56, then, to that state of affairs, the section reads, for relevant purposes, as follows:

" Where the right to use any land (including any . . . structure erected . . . on the land . . .) for the purpose of exhibiting advertisements is let out . . . to any person other than the occupier of the land . . . that right shall be deemed for rating purposes to be a separate hereditament in the occupation of the person for the time being entitled to the right, and shall be included in the valuation list as a separate hereditament accordingly . . ."

What then, on Apr. 12, 1956, was the right which was to be deemed for rating purposes to be a separate hereditament in the occupation of the ratepayers? Surely not merely the right to erect a structure, for that right had already been exercised and was, by then, exhausted. The right, in my judgment, was the right to use the structure which had already been erected. The only possible way of avoiding this view (on the conceded assumption that the sign is in fact within s. 56) appears to me to be that the ratepayers had no more than a contractual right to erect the sign and had no right under the agreement to use the sign after it had been erected. I am quite unable, as I have already intimated, to attribute such a limited effect to the agreement of June 21, 1955.

If I am correct in thinking that the right which, on Apr. 12, 1956, was to be deemed for rating purposes to be a separate hereditament was the right to use for the purpose of exhibiting advertisements the structure which the ratepayers were then using, it follows that the question in the Case Stated must be answered in favour of the valuation officer.

I would add in conclusion that, whilst in no way dissenting from the observations which the Master of the Rolls has made in his judgment as to the meaning of " the right to use any land (including any hoarding, frame . . .) for the purpose of exhibiting advertisements ", I presume that the ratepayers' concession that the neon sign now in question is within s. 56 is based on the view that the framework which secures the sign is a structure and that it is the flashing lights themselves which constitute the advertisement.

SELLERS, L.J.: Under s. 56 of the Local Government Act, 1948, the right which is to be deemed for rating purposes to be a separate hereditament in the occupation of the person for the time being entitled to the right is the right to use any land which is let out or reserved to any person (other than the occupier of the land) for the purpose of exhibiting advertisements. Land includes any hoarding, frame, post, wall or structure erected or to be erected on the land and includes also any wall or other part of a building.

Under the agreement of June 21, 1955, the ratepayers obtained from Bradford Corporation the exclusive right of fixing and exhibiting on the premises named a flashing neon advertising sign reading " Players please " to be erected in the position shown on a rectophot attached to the agreement together with (and this I think is of importance in this appeal) all necessary rights to connect the sign to the electricity supply and to erect and maintain a permanent scaffold and iron ladder.

The scaffold or structure which was in fact erected at the expense of the ratepayers to carry the letters and neon tubing which formed the advertisement " Players please " is shown on a plan accompanying the Stated Case. At the time of the assessment all that structure was erected and in use by the ratepayers. They were using, not only the wall, but also the structure they had erected on the wall for the purpose of carrying or exhibiting their advertisement. This was clearly the whole purpose of the agreement. The right to use the wall was let out to them by the agreement. As they were given the right to erect the permanent scaffold at their own expense, its use might more appropriately be said to be reserved to them than let out to them, but it was a right they acquired by

the agreement. In my opinion these factors and considerations establish that the ratepayers were in occupation of a separate hereditament used as of right consisting of the whole structure as erected and they are therefore liable to be rated thereon at the agreed figure of £165.

In assessing the right to use any land and structure it does not seem to me to matter whether any hoarding or structure is erected and paid for by the occupier of the land or the person deemed under the section to be in occupation of a separate hereditament. The purpose of the section is to place the liability to rates in respect of the exhibition of advertisements on land, as defined, directly on the person enjoying the right to advertise instead of on the occupier of the land. The argument for the ratepayers, as I follow it, would interpret the section as limiting the basis of assessment as well as altering its incidence so that in this case the ratepayers would pay less in paying directly than if the assessment were in the first place on Bradford Corporation and then claimed over under cl. 5 of the agreement, which provides:

> "In the event of the premises being reassessed for rates and the rateable value thereof being increased solely on account of the existence and user of the sign the [ratepayers] will pay to the corporation the difference between the sum payable for rates under the present assessment and the sum due in respect of such increased assessment."

I cannot think that such a result was intended and I do not think it was achieved.

Appeal allowed.

Solicitors: *Solicitor to the Imperial Tobacco Co. (of Great Britain and Ireland), Ltd.*; *Solicitor of Inland Revenue.*

G.F.L.B.

COURT OF APPEAL

(Lord Evershed, M.R., Romer and Sellers, L.JJ.)

July 17, 1959

SOLE *v.* HENNING (VALUATION OFFICER)

Rates—Lands Tribunal—Appeal from decision of local valuation court—Onus of proof—Tribunal to be satisfied of something wrong in findings below—Assessment—Dwelling-house—Method of valuation—Purchase price—Valuation for Rating Act, 1953 (1 & 2 *Eliz.* 2, *c.* 42), *s.* 2 (2).

When considering an appeal against a decision of a local valuation court, the Lands Tribunal is entitled to say that it will not reverse the decision below unless it is satisfied that there is something wrong as a matter of fact in its findings. The onus of proof is on the appellant.

The purchase price of a dwelling-house is not the guide, or a particularly safe guide, in arriving at its gross value as defined in s. 2 (2) of the Valuation for Rating Act, 1953.

Case Stated by Lands Tribunal.

The appellant was the owner and occupier of a hereditament comprising a house, garage and premises, "Edolph", Charlwood, Surrey, and he appealed to the Lands Tribunal against a decision of a local valuation court of Southern Surrey Local Valuation Panel given on Nov. 20, 1957, reducing the assessment

of the hereditament from £125 gross value, £101 rateable value, to £90 gross value, £72 rateable value. The appellant contended that the 1939 rental value should be deduced from the price he had paid for the premises by the application of interest rates subject to reduction factors to allow for the altered value of money. On July 4, 1958, the tribunal (JOHN WATSON, ESQ.) dismissed the appeal with costs, holding that the appellant had "failed to provide me with any grounds for interfering with the decision of the local valuation court". The appellant appealed.

The appellant in person.

J. R. Phillips for the valuation officer.

LORD EVERSHED, M.R.: In this appeal the appellant ratepayer challenges the conclusion of the Lands Tribunal which affirmed an earlier decision of the local valuation court, fixing the figures to be applied for gross value and rateable value in respect of the ratepayer's premises, a house and garage known as "Edolph", Charlwood, in the county of Surrey. The brief history of the matter is that at first the local valuation officer attributed to these premises a gross value of £125, with an appropriate rateable value, but, when the matter came to trial before the local valuation court, those figures were reduced to £90 gross value, £72 rateable value. The local valuation officer has not since sought to justify any higher figure, but the ratepayer, who has put forward with clarity and moderation his complaints about the decision, says that the figure is still too high. He knows that, by the relevant statutory provision in s. 2 (2) of the Valuation for Rating Act, 1953, the rent which the hypothetical tenant is to be treated as being ready to pay is the one which he would have been expected to pay in June, 1939, on a tenancy of a kind there mentioned.

The ratepayer has pointed out that this house is perhaps to some extent unsuited, or not well suited, to modern conditions. The pressure of modern circumstances includes such things as the proximity of Gatwick Airport and the new town. There is also the size of the house, which, if large, is to that extent never so attractive in days when the cost of repairs is great, the difficulty of getting staff is greater, and so forth. These are obviously very pertinent matters, and in arriving at the figure which Parliament has contemplated, one must form an estimate as best one can with the help of such assistance, expert and other, as one can get. In this case, from what his counsel told us, the valuation officer appears to be a gentleman of considerable local knowledge, and also some professional qualifications. At the end of its decision the Lands Tribunal expressed itself thus:

> "I know of no way of valuing this type of house except on the basis of the experience of someone who has valued houses of this kind in the neighbourhood—or, better still, has bought and sold and let them. There is in this case no material evidence of the 1939 value except the opinion of the valuation officer. The local valuation court, with its local knowledge, made a substantial reduction in the original figures and I am satisfied that they were correct in doing so. The valuation officer accepted that reduction and defended it; so far, he said, but no farther. The burden is on the ratepayer to prove that both are wrong and it is unfortunate, if he feels so strongly that that is the case, that he was unable to call any valid evidence of pre-war values, professional or otherwise. He has failed to provide me with any grounds for interfering with the decision of the local valuation court and the appeal must be dismissed."

The ratepayer challenges first the basis of that paragraph. He accepts, as he must, that the Court of Appeal has no jurisdiction save in matters of law, but he says that this was a wrong approach, a misdirection of itself by the tribunal, and therefore an error in law. Further, he says, that the matter should have been treated as res integra, and it is not right to say that the tribunal performs its function by accepting the decision of the local valuation court, unless the appellant, in this case the ratepayer, has affirmatively satisfied the tribunal that the court was wrong. I think that way of putting it may be giving undue emphasis to the phrase, "the burden is on the ratepayer"; but none the less my view is that the tribunal in matters of this kind is entitled to say, and properly performs its function if it does say, "I am not going to overturn the decision of the court below unless I am satisfied by him who complains of it that there is something wrong as a matter of fact in that court's findings." It is quite true that before the tribunal there is a re-hearing of the evidence, but I do not think that there is anything in the paragraph quoted which disqualifies the conclusion based on it, and which, as a consequence, lets in, so to speak, the discussions about the method of valuation which the ratepayer has also intimated to us in his observations.

On those last matters, the ratepayer says: "It is all very well, but the local valuation officer has never bought and sold a house, and I, at any rate, bought this one"; and he based a calculation on the selling price. But I think that counsel for the valuation officer is justified in saying that, by virtue of the case in this court of *Peche* v. *Wilkins* (1), the selling price, for the reasons there stated, is not the guide, or a particularly safe guide in arriving at the notional rent figure postulated by the Act of 1953.

Going back to the main point, I think that the way that I have tried to put it finds support also in the language of the Lands Tribunal Rules, 1956 (S.I. 1956 No. 1734), r. 45 (4) of which provides:

> "On an appeal against the decision of a local valuation court, the tribunal shall give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to the tribunal to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the tribunal to be well founded."

That rule, or its earlier equivalent, and its effect, which is, I think, consistent with what I have stated, is further illustrated and illuminated by another decision of this court, *Ellerby* v. *March* (2).

It comes, therefore, to this, that there is in my judgment no error of law, no misdirection in this vital last paragraph. From that it also follows, I think, that both the tribunal and the local valuation court were entitled on the evidence which was before them to find as a fact as the tribunal and the court did. If that is right, then we have no further say in the matter. No error of law is shown and, therefore, in so far as the question is one of fact, it has been determined, and determined conclusively. For those reasons I would dismiss the appeal.

ROMER, L.J.: I quite agree. The only point which might be regarded as a point of law that the ratepayer sought to introduce before us was this question whether, in the circumstances of this case, the gross value should be ascertained by a calculation based on the purchase price which he paid for this property when he bought it. It was by means of such a calculation as that that the

(1) (1959), 4 R.R.C. 49.
(2) [1954] 2 All E.R. 375; [1954] 2 Q.B. 357; 118 J.P. 382; [1954] 3 W.L.R. 53; 3rd Digest Supp.

ratepayer arrived at the gross value of £65 which he urged before the tribunal. But I think it is quite clear, or at all events has been clear since *Peche* v. *Wilkins* (1), that the selling price or purchase price of a property is not a relevant factor for the purpose for which the ratepayer sought to use it, for the reasons to which MORRIS, L.J., referred in his judgment in that case. One therefore comes down to a pure question of fact. As to that I have nothing to add to what the Master of the Rolls has said, and I agree with him.

SELLERS, L.J.: I agree with the judgment of the Master of the Rolls.

Appeal dismissed.

Solicitor: *Solicitor of Inland Revenue.* G.F.L.B.

(1) (1959), 4 R.R.C. 49.

QUEEN'S BENCH DIVISION

(SALMON, J.)

July 13, 14, 15, 24, 1959

ATTORNEY-GENERAL (on the relation of THOMAS BROWNLEE PAISLEY) AND ANOTHER *v.* ST. IVES RURAL DISTRICT COUNCIL AND ANOTHER

Land Drainage—Repairs of drains—Maintenance of drains duty of surveyor of highways under inclosure award—Failure to keep drains in fit and proper condition—Non-feasance—Liability of rural district council—Local Government Act, 1929 (19 *Geo.* 5, *c.* 17) *s.* 30 (1), *proviso.*

By an award made under an Inclosure Act of 1800 two drains running adjacent to and through land belonging to P. were maintainable and repairable by the surveyor of the parish highways out of a rate levied by him on all occupiers of lands within the parish. The surveyor's duties were subsequently transferred to the highway board for the district in which the drains lay by the Highway Act, 1862, s. 11, and by the Local Government Act, 1894, they were transferred to the rural district council. By the Local Government Act, 1929, s. 30 (1), the county council was made the highway authority for all rural districts in the county, and, as such, had all the functions under the Highway Acts, 1835 to 1885, as were exercisable by rural district councils as successors to highway boards. Rural district councils ceased to be highway authorities. By the proviso to s. 30 (1) of the Act of 1929, "nothing in this section shall affect . . . any functions not being functions with respect to highways exercisable . . . by rural district councils as successors to surveyors of highways or highway boards." It was not disputed that between 1894 and the passing of the Act of 1929 the duty to maintain and repair the drains lay on the rural district council. No work had been done on the drains since 1947, and partly as a result of the non-repair of the drains P.'s land had from time to time been flooded. In an action by the Attorney-General on the relation of P. and by P., the plaintiffs claimed a declaration that either the rural district council or the county council were bound in law to maintain and keep the drains in repair. P. also claimed damages against one or other of the councils.

HELD: (i) the duty to maintain and repair the drains lay on the rural district council, since, although the main part of s. 30 (1) of the Act of 1929 was apt to transfer these duties to the county council, the drains were part of the land drainage scheme, and, therefore, the function of maintaining and repairing them was not a function with respect to highways within the proviso to s. 30 (1), and, accordingly, were not transferred to the county council; (ii) the immunity from liability for non-feasance which applied to highway authorities did not extend to the rural district council who were, therefore, liable to be sued for their failure to maintain and repair the drains; (iii) the Inclosure Act was passed and the award thereunder made for the benefit of the persons in favour of whom the inclosures were made, and, therefore, P. was entitled to the declaration and to damages since he was such a person in that his land was immediately adjacent to the drains and the drains passed through his land.

ACTION by the plaintiffs, the Attorney-General suing at the relation of Thomas Brownlee Paisley and Thomas Brownlee Paisley suing personally, claiming against the first defendants, St. Ives Rural District Council, and the second defendants, Huntingdon County Council, a declaration that under an Inclosure Act of 1800, relating to the parish of Holywell with Needingworth (referred to hereafter as "the parish of Holywell"), in the county of Huntingdon, and an award made under that Act, the first defendants, alternatively, the second defendants, were now the authority bound in law to maintain and keep in repair certain drains within the parish of Holywell. The second plaintiff, Mr. Paisley, also claimed damages for injury caused to his land by reason of one or other of the defendants' breach of duty in failing to maintain and keep in repair the drains. The second plaintiff was the owner and occupier, and farmed land known as Manor Farm, Holywell, which was situated within the rural district of St. Ives in the county of Huntingdon. Two drains, known as Parsons Drove and Heath Drain, ran adjacent to, and passed through, Manor Farm. The first drain ran from Stocks Bridge until it entered the River Ouse and the second drain ran southwards from Bath Hill Bridge until it joined the first drain. These drains were originally natural watercourses and were small tributaries of the Great Ouse; they left the Great Ouse outside the parish of Holywell, joined together inside the parish and then flowed onward to the River Ouse. They were natural drains for the land on each side of them, and while only two or three feet wide and quite shallow at their source, they gradually broadened as they reached the parish of Holywell. By an Inclosure Act of 1800, relating to the parish of Holywell, the commissioners therein designated were required to appoint a surveyor of the highways within the parish, and, among other things, were empowered to scour out and widen the ancient brooks, ditches and watercourses in the parish of Holywell and to set out new ditches, drains and watercourses in and through the lands and grounds thereby intended to be inclosed, of such breadth and depth and in such direction as the commissioners thought fit. The commissioners were further empowered, and the duty was imposed on them, to order and award by whom, at whose expense and at what time and in what manner the said brooks, ditches, drains and watercourses should thereafter be repaired, cleaned, scoured and maintained. By an award made in 1803 under the Inclosure Act of 1800, the commissioners ordered that Parsons Drove and Heath Drain, among other drains in the parish of Holywell, should be for ever thereafter maintained and kept in repair, to the respective breadths and depths specified in the award, by and at the expense of the surveyor of highways for the time being out of a rate to be levied by him on all occupiers of lands and grounds within the parish of Holywell. By the Highway Act, 1862, s. 11, these duties were transferred from the surveyor of highways to the highway board for the district in which the drains lay. The duties transferred to the highway board were in turn transferred to the first defendants, as the rural district council, under the Local Government Act, 1929, s. 25. No work had been done on the drains since 1947, and for years they had been seriously choked, overgrown and silted, and were generally in a very bad condition. The second plaintiff's land had from time to time been seriously flooded, partly as a result of the non-repair of the drains, and this had interfered with his farming and had caused him damage. While it was common ground that the duty to maintain and repair the drains lay on one or other of the defendants, the second defendants, the county council, contended that, by virtue of the Local Government Act, 1929, s. 30 (1) and the proviso thereto, these duties lay on the first defendants, the rural district council, and had not been transferred to the second defendants since they

were not functions under the Highway Acts, 1835 to 1885, within s. 30 (1), nor were they functions with respect to highways within the meaning of the proviso. Further, both defendants contended that failure to maintain and repair the drains was non-feasance and that the plaintiffs had no right of action in respect thereof. The question also arose whether the second plaintiff had the right to sue for damages for breach of any statutory duty to maintain and repair the drains that was imposed by the Inclosure Act of 1800 and the award.

Harold Williams, Q.C., and *A. L. Figgis* for the plaintiffs.
Scholefield, Q.C., and *G. J. Ponsonby* for the rural district council.
Widgery, Q.C., and *Alan Fletcher* for the county council.

Cur. adv. vult.

July 24. **SALMON, J.,** read a judgment in which he stated the facts and the relief claimed by the plaintiffs, referred to the Inclosure Act of 1800 and to the commissioners' award made thereunder, referred to the transfer, by s. 11 of the Highway Act, 1862, of duties relating to the drains in the parish of Holywell from the surveyor of highways to the highway board for the district in which they lay and continued: By s. 25 of the Local Government Act, 1894, the duties of the highway board were transferred to the first defendants (hereinafter referred to as " the district council "), and the highway board was abolished. Section 25 (1) read as follows:

" . . . There shall be transferred to the district council of every rural district all the powers, duties, and liabilities of the rural sanitary authority in the district, and of any highway authority in the district, and highway boards shall cease to exist, and rural district councils shall be the successors of the rural sanitary authority and highway authority, and shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under s. 144 to s. 148 of the Public Health Act, 1875, and those sections shall apply in the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority."

It is not disputed that between the year 1894 and the date when the Local Government Act, 1929, came into operation the duty to maintain and repair the drains lay on the district council. A great deal in this case turns on the true construction of s. 30 (1) of the Local Government Act, 1929, which reads as follows:

" As from the appointed day, every county council shall be the highway authority as respects such part of the county as is for the time being comprised in any rural district and as respects the highways therein, and as such shall have all such functions under the Highway Acts, 1835 to 1885, as were exercisable by rural district councils who by virtue of the Local Government Act, 1894, became successors of highway boards, and rural district councils shall cease to be highway authorities: Provided that nothing in this section shall affect the functions of rural district councils under the Local Government Act, 1894, as respects rights of way and encroachments on roadside wastes, or any functions not being functions with respect to highways exercisable at the appointed day by rural district councils as successors to surveyors of highways or highway boards."

The district council, contend that on the true construction of this subsection their duty to maintain and repair the drains was transferred to the county council.

Counsel for the county council contends first that the main part of the subsection does not transfer the duties to which I have referred, inasmuch as these duties are not functions under the Highway Acts, 1835 to 1885. Alternatively, counsel contends that, if the main part of the subsection looked at by itself would be apt to transfer these duties, they are expressly reserved to the district council by the proviso.

In my judgment, the main part of s. 30 (1) does transfer these duties to the county council. The Highway Act, 1862, is one of the Acts included in the words "the Highway Acts, 1835 to 1885". Section 11 of the Highway Act, 1862, amongst other things provides that

> "All such . . . duties, liabilities . . . as are vested in or attached to . . . any surveyor . . . of any parish forming part of the district, shall vest in and attach to the highway board."

One of the duties vested in and attached to the parish surveyor, and, therefore, one of his functions, was the duty or function of maintaining and repairing the drains in question. This duty or function was, therefore, transferred to the highway board by the Highway Act, 1862, and was exercisable by the district council as successors of the highway board under the Local Government Act, 1894. Accordingly but for the proviso, s. 30 would, in my judgment, clearly transfer the duties of maintaining and repairing the drains to the county council.

The second contention of counsel for the county council, namely, that the proviso reserves the duty to maintain and repair the drains to the district council, raises a point of some difficulty as well as of general importance. I understand that this point has been very much of a live issue between county councils and rural district councils since the year 1929, but so far has never been litigated.

Counsel for the plaintiffs supports the part of counsel for the county council's argument relating to the construction of the proviso, although he dissociates himself from counsel's first contention, with which I have already dealt.

Counsel for the county council contends that the whole proviso is of no effect and is inserted in the section only ex abundanti cautela. He says that its sole purpose is to make it plain that only functions with respect to highways under the Highway Acts, 1835 to 1885, exercisable by rural district councils as successors to the highway boards passed to the county councils, and that all the rural district council's other functions, for example under the Public Health Acts, are left with the rural district councils. If this be the true construction of the proviso, then the first part of the proviso is otiose.

Counsel for the district council replies that, on any view of the subsection, the first part of the proviso is otiose. He says that the last part of the proviso refers merely to functions imposed under various Public Health and Local Government Acts—such functions, for example, as watering and scavenging the highways. I am unable to give such a narrow construction to the language of the proviso. It seems to me to contemplate that there were functions (for example, land drainage functions) exercisable by rural district councils as successors to the highway boards which were not functions with respect to highways and to enact that such functions should not pass to the county councils. In my view, it is possible to see how the first part of the proviso may have been inserted having regard to the last words in the main part of the subsection, "and rural district councils shall cease to be highway authorities". Without the first part of the proviso it would, perhaps, have been possible to regard the duty imposed under s. 26 of the Local Government Act, 1894, to prevent the obstruction of highways, as part of the duties of a highway authority, and accordingly left in the air, since

the rural district councils ceased to be the highway authorities and the duty was manifestly not transferred to county councils.

The second part of the proviso is, however, in the most general terms and cannot, in my judgment, properly be given the narrow construction for which counsel for the district council contends.

The second contention of counsel for the district council is that the duty to maintain and repair the drains is a function with respect to highways and is, therefore, not reserved to rural district councils under the proviso. This contention depends on the true construction of the somewhat loose words " any functions not being functions with respect to highways ". By the awards, of which I understand there were about four thousand, made under various Inclosure Acts, the parish surveyors had certain functions cast on them, some admittedly with respect to highways, and some relating to drains and ditches draining a great deal of the land in rural districts. Accordingly, the functions of the surveyors under these awards related mainly to highways but partly also to land drainage. It is possible that one of the reasons why these latter functions were imposed on the surveyors was because the highways at certain points might be affected by land drainage. There are, of course, road drains and gulleys whose main, if not whose only, function is to drain the highway. The repair of such drains and gulleys is, in my judgment, clearly a function with respect to highways. There are other drains and ditches whose function is solely to drain agricultural land and which cannot in any way affect highways. The repair of such drains and ditches is equally clearly not a function with respect to highways. Then there are drains and ditches that affect both agricultural land and highways. Whether or not the function of maintaining and repairing these drains and ditches can properly be described as a function with respect to highways depends, in my view, on the degree to which the drains can be truly regarded as land drainage or road drainage.

In my judgment, the drains in question in this case are undoubtedly part of the land drainage scheme, and their non-maintenance and disrepair can affect only incidentally a small section of the highway within the parish of Holywell. I agree with the contention of counsel for the county council that the true inference to be drawn in this case is that originally the duty to maintain and repair these drains was cast on the surveyor not because of their effect on the highways but because as they approached the parish of Holywell they increased in breadth and depth so that they became an important part of the land drainage in the parish and, as such, of general importance to the inhabitants. There were only four parish officers: the clerk, the constable, the overseer and the surveyor. The surveyor would appear to be the officer whose duties were most in line with the maintenance and repair of drains. I do not say that the fact that the non-repair of these drains might have had some effect on certain sections of the highway was not a minor reason for selecting him rather than any of the other officers of the parish. I have not lost sight of the fact that, in adjacent parishes, where the two drains in question did not run alongside or across highways, the duty to maintain and repair them was cast on the riparian owners. I think that in those places the drains were so narrow and small that they could not be looked on as of any importance to the inhabitants of the parish generally but as of limited importance and that only to the riparian owners.

It follows that, in my judgment, the function of maintaining and repairing these drains in the parish of Holywell was not a function with respect to highways within the meaning of the proviso of s. 30 (1) of the Act of 1929, and, accordingly, was not transferred to the county council but was reserved to the district council.

The next point that falls for decision is whether or not the defendants are liable to be sued for their failure to maintain and repair the drains. The defendants contend that the failure to maintain and repair the drains is non-feasance and that, accordingly, the plaintiff has no right of action in respect thereof. Highway authorities are clearly not liable in damages for any negligent non-repair of a highway since the surveyor of highways was never personally liable for damages arising from mere omission to repair. No action at common law is or was maintainable against the parish for non-repair of the highways. The only remedy against the parish is by way of indictment. The Highway Act, 1835, merely enabled the parish to conduct its work through the surveyor. The duty to repair still remained and remains in the inhabitants at large. Accordingly, no action for non-repair of the highway is maintainable against the surveyor or against his successors, the present highway authorities: *Young* v. *Davis* (1). This rule has long been established in our law, and no doubt has the soundest historical justification. It is, however, an archaic and anomalous survival into modern times. It would be difficult indeed to think of any sound reason why today highway authorities should enjoy this immunity. Nevertheless, there can be no doubt that in law they do enjoy the immunity, and I must apply the law; but I am not obliged to extend it.

In the present case I am being asked to extend it to the maintenance and repair of the drains in question. If these drains were designed to drain the highway I should as at present advised feel myself bound, however reluctantly, to apply the rule. The situation is, however, very different. The only connexion, and to my mind a very tenuous one, between the rule and the facts of the present case is that formerly the duty to maintain and repair the drains lay on the highway authority. The immunity that the highway authorities enjoy for the non-repair of highways is not out of any special tenderness which the law feels for highway authorities as such, but merely because the duty of repairing the highway fell on them or was transferred to them as representatives of the inhabitants at large, and no action lay against the inhabitants at large; they could be proceeded against only by way of indictment: see *Swain* v. *Southern Ry. Co.* (2) per FINLAY, L.J. In the present case the duty of repairing the drains was not originally on the inhabitants at large but was cast on the surveyor by the award made under the Inclosure Act of 1800. Neither the inhabitants at large nor the surveyor were liable, nor are their successors liable, to be indicted in respect of their failure to maintain and repair the drains. I can see no reason for extending the immunity from liability for non-feasance to the district council. *Gibraltar Sanitary Comrs.* v. *Orfila* (3), which is strongly relied on by the defendants, seems to me to turn almost exclusively on the construction of a local ordinance.

The only other question which remains for decision is whether the breach of duty to maintain and repair the drains gives the plaintiff, Mr. Paisley, a personal right to sue, or whether an action can be brought only by Her Majesty's Attorney-General on the relation of Mr. Paisley. The point for decision really turns on whether it was the intention of the legislature to make the duty imposed one

> "which was owed to the party aggrieved as well as to the state, or was it a public duty only? That depends on the construction of the Act and the circumstances in which it was made and to which it relates."

(1) (1863), 2 H. & C. 197.
(2) [1939] 2 All E.R. 794; [1939] 2 K.B. 560.
(3) (1890), 15 App. Cas. 400.

See *Phillips* v. *Britannia Hygienic Laundry Co.* (1) per ATKIN, L.J. In other words, the court must

> " . . . consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large or in those of a particular class of persons."

See *Groves* v. *Lord Wimborne* (2) per A. L. SMITH, L.J. In deciding this question one must look at the Act generally and consider, amongst other things, whether any penalty is provided for breach of the statutory duty. If a statutory duty is imposed and no remedy by way of penalty or otherwise is prescribed for its breach generally a right of civil action accrues to the person who is damnified by the breach. " For, if it were not so, the statute would be but a pious aspiration ": see *Cutler* v. *Wandsworth Stadium, Ltd.* (3) per LORD SIMONDS.

In the present case, the Inclosure Act of 1800 and the award thereunder imposed no penalty or other sanction for non-compliance with the duty to maintain and repair the drains, and I have come to the clear conclusion that the Act was passed and the award made for the benefit of the persons in favour of whom the inclosures were made, that is to say for the persons whose land is immediately adjacent to the drains and through whose land the drains pass. I am fortified in this conclusion by the last recital to the Act.

It follows, in my judgment, that the plaintiff, Mr. Paisley, is entitled against the first defendants to a declaration as prayed and to damages. The damages will be assessed by an official referee. In reaching his decision he will no doubt take into account, amongst other things, the extent to which the flooding of the plaintiff's land is attributable to the failure to repair the drains and maintain them in the breadth and depth specified in the award and to the actions (if any) which the plaintiff might reasonably have taken to mitigate his damage.

Judgment for plaintiffs against rural district council.

Solicitors: *Fisher, Dowson & Wasbrough*, for *Francis & Co.*, Cambridge; *John J. McIntyre*; *Sharpe, Pritchard & Co.*, for *A. Case Aylward*, Huntingdon.

G.A.K.

(1) [1923] 2 K.B. 832.
(2) [1898] 2 Q.B. 402.
(3) [1949] 1 All E.R. 544; [1949] A.C. 398.

QUEEN'S BENCH DIVISION

(SALMON, J.)

July 21, 30, 1959

BARNET GROUP HOSPITAL MANAGEMENT COMMITTEE *v.* EAGLE STAR INSURANCE CO., LTD.

Hospital—Right to recover expenses incurred by hospital in treating person injured in accident—Insurance against third-party risks, covering voluntary passengers—Insurers not aware of hospital treatment at time of making payment to person injured—Road Traffic Act, 1930, *s.* 36 (2), *as substituted by Road and Rail Traffic Act*, 1933, *s.* 33.

While G. was travelling as a voluntary passenger in a car, he was injured in a motor accident. He received treatment at a hospital. The owner-driver of the car was insured against third-party risks by a policy issued by the defendants, the insurers, which not only complied with the requirements of the Road Traffic Act, 1930, s. 36 (1), in relation to such policies, but also extended to cover liability to voluntary passengers. The insurers made a payment under the policy to G. At that time they did not know that G. had received hospital treatment. The appropriate hospital authority sued the insurers for the expenses of treating G., claiming under s. 36 (2) of the Act of 1930, whereby they would be entitled to the expenses if the payment that the insurers had made to G. was a payment "in consequence of a policy issued under [Part 2 of the Act of 1930] in respect of . . . bodily injury to any person" and if G. had "to the knowledge of" the insurers received treatment at a hospital. At the date of the issue of the writ the insurers knew that G. had received such treatment.

HELD: (i) the insurers' knowledge required to satisfy the Road Traffic Act, 1930, s. 36 (2), was knowledge existing at the time when payment was made by the insurers to the person injured; therefore, since the insurers had no such knowledge at the time when they paid G., the hospital authority was not entitled to recover the expenses of G.'s treatment from them; (ii) the fact that the cover afforded by the policy extended to voluntary passengers, and, therefore, beyond what was required by s. 36 (1) of the Act of 1930, did not make it any the less a policy "issued under" Part 2 of the Act of 1930 within s. 36 (2); (iii) the words "any person" in s. 36 (2) of the Act of 1930 covered voluntary passengers and were not confined to persons compulsorily insured.

ACTION in which the plaintiffs, the Barnet Group Hospital Management Committee, claimed from Eagle Star Insurance Co., Ltd., the defendants, expenses amounting to £12 12s. 6d. incurred by the plaintiffs in treating, as an in-patient at Barnet General Hospital, one George Groom who had been injured while travelling as a passenger in a motor car owned and driven by a Mr. Boost. The plaintiffs relied on the Road Traffic Act, 1930, s. 36 (2), as substituted by the Road and Rail Traffic Act, 1933, s. 33, in support of their claim.

Cumming-Bruce for the defendants.

Gerald Gardiner, Q.C., and *Michael Lee* for the defendants.

Cur. adv. vult.

July 30. **SALMON, J.,** read the following judgment: On Jan. 28, 1955, Mr. George Groom, whilst travelling as a passenger in a motor car owned and driven by Mr. Boost, sustained certain bodily injuries. He was on that day taken to Barnet General Hospital where he received treatment as an in-patient until he was discharged on Feb. 2, 1955. The hospital reasonably incurred expenses amounting to £12 12s. 6d. in respect of this treatment.

At the time of the accident Mr. Boost was insured with the insurers, the defendants, in respect of the use of his motor car against all such liability as is required to be covered by the provisions of the Road Traffic Act, 1930, s. 36 (1) (b), and also against liability to voluntary passengers travelling in his motor car.

The insurers made a payment under the policy to Mr. Groom in respect of his injuries. At the time they made the payment they did not know that Mr. Groom had been treated in hospital, although they knew of that fact before the issue of the writ.

The plaintiffs (hereafter referred to as "the hospital"), who administer Barnet General Hospital under the National Health Service Act, 1946, claim that they are entitled to recover their expenses of £12 12s. 6d. from the insurers by virtue of the Road Traffic Act, 1930, s. 36 (2), as substituted by the Road and Rail Traffic Act, 1933, s. 33, and applied by sched. 10, Part I, to the National Health Service Act, 1946. The case turns largely on the construction of s. 33 of the Act of 1933, which is as follows:

> "Section 36 of the Road Traffic Act, 1930 (which relates to requirements in respect of policies of insurance) shall be amended by substituting for sub-s. (2) thereof the following subsection:—'(2) Where any payment is made (whether or not with an admission of liability) by—(a) an authorised insurer under or in consequence of a policy issued under this Part of this Act' [and then I omit words which in my view are immaterial to the case] 'in respect of the death of or bodily injury to any person arising out of the use of a motor vehicle on a road or in a place to which the public have a right of access, and the person who has so died or been bodily injured has to the knowledge of the authorised insurer or such owner as the case may be received treatment at a hospital, whether as an in-patient or as an out-patient, in respect of the injury so arising, there shall also be paid by the authorised insurer . . . to such hospital the expenses reasonably incurred by the hospital in affording such treatment . . .'"

Then there are some provisions limiting the amount which the hospital can recover.

The first question for decision is whether the payment by the insurers (who admittedly are authorised insurers within the meaning of the Act) is a payment in consequence of a policy issued under the Act. There can be no doubt that the payment was made under the policy of insurance dated Mar. 3, 1955, but was this a policy issued under Part 2 of the Road Traffic Act, 1930?

Section 35 (1) of the Act of 1930 reads as follows:

> "Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance . . . in respect of third-party risks as complies with the requirements of this Part of this Act."

Then s. 36 (1) of the same Act reads as follows:

> "In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which—(a) is issued by a person who is an authorised insurer within the meaning of this Part of this Act; and (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road: Provided that such a policy shall not be required to cover . . . (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise."

Subsection (5) of s. 36 reads:

"A policy shall be of no effect for the purposes of this Part of this Act unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Part of this Act referred to as a 'certificate of insurance') in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed . . ."

It seems to me beyond argument that the policy in question is a policy issued under Part 2 of the Road Traffic Act, 1930. It is true that it includes cover in respect of liability in respect of death or bodily injury of passengers which it is not required to include by s. 36 (1) which I have just read. I can, however, see no reason why a policy which gives the cover required by the Act and complies with all the requirements of the Act fails to qualify as a policy issued under the Act merely because it includes cover beyond that made compulsory by the Act. The language of the proviso strongly supports this view. The words: "Provided that such a policy shall not be required to cover," seem to envisage that such a policy may cover liability in respect of voluntary passengers, although it need not do so. It is also to be observed that the certificate of insurance, which is in the prescribed form, states that the policy is issued in accordance with the provisions of the Act. Accordingly, in my view, the payment to Mr. Groom was made by an authorised insurer under a policy issued under Part 2 of the Road Traffic Act, 1930.

The next question that arises is whether or not Mr. Groom was "any person" within the meaning of s. 36 (2) of the Act of 1930. Prima facie, Mr. Groom clearly is "any person". Counsel for the insurers argues, however, that "any person" means any person of the class required to be covered by the Act. Why should the court give such a limited construction to the meaning of the words "any person"? In my view, such a construction involves writing words into the statute that are not there. If the legislature had intended the payment mentioned in s. 36 (2) to be confined to persons of the class required to be covered by the Act, it could have expressed that intention in plain language. Indeed, where the legislature does intend to confine the operation of the Act to such liability as is required to be covered by the Act, it expresses that intention clearly. See, for example, s. 10 and s. 11 of the Road Traffic Act, 1934. In my judgment, the words "where any payment is made . . . by an authorised insurer under . . . a policy issued under this Part of this Act in respect of . . . bodily injury to any person" are as wide as they can be and I can see no reason for cutting down their meaning.

I think that counsel for the hospital is right when he suggests that the object of Parliament in passing the Road Traffic Acts was to protect not only persons injured in motor car accidents but also the hospitals who treat such persons for their injuries. I can see no reason why the provisions of s. 36 (2) should be confined to persons compulsorily insured and exclude voluntary passengers. The hospital treatment is no less valuable to the voluntary passengers than it is to any other third parties. Moreover, the insurers obviously benefit as much from the treatment of a voluntary passenger as they do from the treatment of any other third party. But for such treatment injuries would have graver consequences and accordingly damages payable by the insurers would be higher. I hold that the words "any person" in s. 36 (2) include voluntary passengers.

Although, curiously enough, there is no authority on this point in England, I am supported in the view I have formed by the majority judgments of the Court of Appeal in Ireland in *Royal Victoria Hospital* v. *London Guarantee & Accident Corpn., Ltd.* (1).

(1) [1937] N.I. 64.

I have thought it right, out of respect for the careful arguments which I have heard, and because this case may well go further, to express my conclusions on the points with which I have already dealt. These conclusions cannot, however, affect the result of this case having regard to the view that I have formed on the other point with which I will now deal.

The hospital's difficulty in this case arises out of the words in s. 36 (2):

> " Where any payment is made . . . by—(a) an authorised insurer under or in consequence of a policy issued under this Part of this Act . . . in respect of . . . bodily injury to any person arising out of the use of a motor vehicle on a road . . . and the person who has so . . . been bodily injured has to the knowledge of the authorised insurer . . . received treatment at a hospital . . . in respect of the injury so arising, there shall also be paid by the authorised insurer . . . the expenses reasonably incurred by the hospital in affording such treatment . . ."

The strict grammatical interpretation of the words of the statute which I have read is that in order for any liability to fall on the insurers in respect of hospital treatment, the insurers must have knowledge of the treatment before paying the third party. This is conceded by counsel for the hospital, who argues, however, that there is an obvious grammatical mistake on the part of the draftsman. He invites me, in effect, to re-write the section—an invitation which, however attractive counsel makes it sound, I find myself compelled to decline. It is easy to see why Parliament should have required that the insurers' knowledge of the hospital treatment should precede payment to third parties for that payment to render them liable for those expenses. Many thousands of claims by third parties are settled each year by insurance companies. In assessing the value of the claim it is important for the insurers to appreciate their possible total liability. For example, it might be thought that the most a claim was worth in order to avoid litigation was £x. If the hospital expenses are £y, the insurers, with knowledge of the hospital treatment, would settle the claim on the basis of paying the third party £x minus £y and paying the hospital £y. It would be a hardship if, after paying the whole sum of £x to the third party in ignorance of his having received hospital treatment, the insurers should have to pay out a further £y in respect of such treatment. There seems to me to be no reason for the legislature to insert in s. 36 the provision as to knowledge of the hospital treatment unless the knowledge is to precede the payment to the third parties. Counsel for the hospital suggests that the knowledge need precede only the issue of the writ, and that the object of the legislature was to prevent a writ being issued by the hospital against the insurer before the insurer had received notice of the hospital treatment. Ingenious as this argument may be, it does not carry conviction to my mind. It seems to me inconceivable that any hospital which had a statutory right to recover its expenses against an authorised insurer would go to the trouble and expense of issuing a writ without first asking the insurer to discharge his statutory obligation. I cannot think that Parliament inserted words in a statute merely to guard against an eventuality which no reasonable man would consider in the least likely to arise.

Accordingly, since it is admitted that the insurers in this case did not know of the hospital treatment until after they made their payment to Mr. Groom, they are under no statutory obligation to pay the expenses of that treatment to the hospital. There will accordingly be judgment for the insurers.

Judgment for defendants.

Solicitors: *Morton Jones, Lewsey & Jefferies*; *Simmons & Simmons.*

G.A.K.

Eng. Per

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COURT OF APPEAL

(HODSON, SELLERS AND HARMAN, L.JJ.)

June 3, 4, 5, 9, July 30, 1959

LILLEY *v.* LILLEY

Husband and Wife—Maintenance—Liability of husband—Enforced separation due to wife's ill-health—Right to maintenance dependent on wife's intention to return.

As between husband and wife the husband cannot be guilty of wilful neglect to maintain the wife unless he is a wrongdoer, but the wrongdoing need be no more than failure to maintain. The husband's liability to maintain is not affected by an enforced separation due to the illness of the wife, including mental disorder, provided that the wife's intention to return to the husband subsists.

During a marriage the wife developed an invincible repugnance, due to mental or nervous disorder for which she voluntarily underwent medical treatment, to sexual intercourse with her husband. The parties separated and a stipendiary magistrate found the husband guilty of desertion and ordered him to pay the wife maintenance. Later, the husband made the wife a genuine offer to resume cohabitation which she refused to accept and the magistrate discharged the order. The husband continued to pay maintenance voluntarily for a short while, but then ceased to do so and the wife made a complaint to the magistrate, alleging that the husband had wilfully neglected to provide reasonable maintenance for her. Medical evidence was given to the effect that if the wife returned to the husband, there would be a serious breakdown in her health. The wife, whom the magistrate found to be capable of making a rational decision and of forming an intention to desert, said in evidence that she was determined not to live with the husband. She did not allege that the husband was guilty of any matrimonial misconduct and conceded that he was not in desertion of her, but she contended that he was liable to maintain her at common law and that his deliberate refusal to do so amounted to wilful neglect. The husband contended that he was under no liability to maintain the wife since (i) he was guilty of no matrimonial misconduct, and (ii) she was in desertion.

HELD: if the wife were not in desertion, a separation enforced by her illness would not disentitle her to maintenance, but she was capable of making a decision to desert the husband and, on the facts, had done so, and, therefore, she was in desertion and so was not entitled to maintenance.

APPEAL by a wife from the decision of a Divisional Court of the Probate, Divorce and Admiralty Division, dismissing her appeal against the dismissal by the stipendiary magistrate for Kingston-upon-Hull, of her complaint that her husband had been guilty of wilful neglect to provide reasonable maintenance for her.

Lyons, Q.C., and *R. H. Hutchinson* for the wife.
Raeburn, Q.C., and *McHale* for the husband.

Cur. adv. vult.

July 30. **HODSON, L.J.,** read the following judgment of the court. This is an appeal from a decision of the Divisional Court of the Probate, Divorce and Admiralty Division dismissing an appeal from the learned stipendiary magistrate of Kingston-upon-Hull, who had dismissed a summons taken out by the appellant, the wife of the respondent, alleging that he had been guilty of wilful neglect to maintain her. The summons now before this court was issued on Jan. 4, 1958, and was determined by the magistrate on Feb. 26, 1958, when he dismissed it on two grounds: (i) that the husband had no legal liability to maintain the wife because he had not been guilty of matrimonial misconduct; (ii) that the wife is herself in desertion and therefore not entitled to the order sought. The Divisional Court affirmed the decision on the first ground while rejecting the second.

The argument for the wife before us has been that if, as the Divisional Court has found, she is not in desertion of her husband, and there is no allegation of adultery against her and no agreement to live apart without the support of her husband, he is obliged to maintain her although she cannot live under his roof and has expressed her fixed intention not to do so. The husband, on the other hand, has argued—and this is his main contention—that the magistrate was right in holding that the wife was in desertion and that for this reason his obligation to maintain his wife is suspended and he cannot during that suspension be held guilty of wilful neglect to maintain her. In the alternative, he has sought to support the decision of the Divisional Court that even if she is not in desertion he is not liable to maintain her in the circumstances of this case because he is not guilty of wilful neglect.

The magistrate had had the parties before him on two earlier occasions. First, on Oct. 12, 1954, he had made an order in the wife's favour on her application, on the ground of the husband's desertion, together with an order for the custody of the child of the marriage. Secondly, on Aug. 23, 1957, on the husband's application, he discharged the 1954 order and at the same time made an order under the Guardianship of Infants Acts giving the wife the custody of the child and an order for the child's maintenance at the rate of 30s. a week. Nevertheless for a time the husband continued voluntarily to pay the wife maintenance for herself as well as the child at the rate of the previous order; but on Sept. 6, 1957, he ceased to pay anything over and above the amount of the 1957 order made in respect of the child, and eventually, the husband having discontinued his voluntary allowance, this summons was issued.

The wife was at the time of the hearing of the summons (in February, 1958) living with her mother and had been earning by part-time work as a secretary £3 10s. to £4 10s. a week since September or October, 1957. The magistrate found that she was receiving a salary of £4 10s. a week at the time of the hearing. No evidence was given as to the husband's means, and it is not clear that an order for maintenance would in the circumstances existing have been made, for the husband elected to call no evidence and to stand on his submission that whatever his means might be no order could be made since he was not guilty of the offence with which he was charged. The case has, however, been argued on the footing that the wife is or may be, having regard to the respective means of the parties, entitled to an order for her maintenance if she can prove that her husband has, in the words of the Summary Jurisdiction (Married Women) Act, 1895, been guilty of wilful neglect to maintain.

The parties were married on Oct. 2, 1948, and on Mar. 13, 1952, a child was born. The confinement was a difficult one, and thereafter the wife suffered from some mental or nervous disorder either caused or aggravated by the birth of the child. In particular she developed an invincible repugnance to sexual intercourse. She had no sexual intercourse with her husband after February, 1952—that is, before the birth of the child. On Oct. 2, 1952, her condition was such that she was admitted as a voluntary patient to a mental hospital, the Delapole Hospital at Hull, where Dr. Hendy, who was called as a witness in the case, was the assistant psychiatrist and had the wife under his care. She left the hospital in August, 1953, and returned home to her husband, but had to return to hospital on Sept. 15, 1953, where she remained, subject to short absences, until June, 1956, when she went to live with her mother and the child. Thereafter she visited the hospital regularly as an outpatient and was seen by Dr. Hendy every two or three weeks. Between April, 1954, and the week-end of June 24-25, 1954, in an attempt to get herself rehabilitated, the wife went home for week-ends on

the footing that she and her husband occupied separate bedrooms and that there would be no sexual intercourse. When the wife left the last time it was expected that she would return, but she did not do so, and in July, 1954, Dr. Hendy told the husband that in his opinion the wife's condition was incurable.

The husband then consulted solicitors, and on their advice wrote a letter dated Aug. 2, 1954, to the wife threatening proceedings for divorce, on which the magistrate found him to be in desertion and made the order of Oct. 12, 1954, already referred to. The next year there was a meeting between the parties with a view to reconciliation, after which the wife wrote to the husband a letter dated Sept. 8, 1955, in the following terms:

> "After seeing you and knowing how things stand between us, I have to say that there is no chance of a reconciliation between us. We are legally separated and under the court order you are allowed to see Margaret, and I shall not stop you from doing so. You know why this has happened and I ask you not to judge me too harshly. I am sorry to have caused you any unhappiness but remember I have suffered too."

After the wife left hospital in June, 1956, the husband made further efforts at reconciliation in the hope and belief that the wife had recovered, but his letters were not answered. On Apr. 1, 1957, the husband wrote to the wife again on the assumption that she had recovered. Her reply, dated Apr. 3, 1957, was as follows:

> "I received your letter yesterday. There was no need to send me a registered letter because I receive *all* mail sent to me. As regards my mother being unco-operative, that is because I told her not to answer questions asked about me, I object to people wanting to know where and what I am doing. I have my own life to live and I don't go around asking questions about you. Many are times I have heard you questioning Margaret, would you please refrain from doing it. Margaret is only a child and she does not understand what is going on. You know how I feel about coming back to you. I wrote you and gave you a definite answer when I last saw you at the hospital. My answer is still the same. You know the reasons why. From a medical point of view it is impossible. If you doubt my word you need only ask Dr. Hendy and he will confirm this. Even though I am out of hospital the reasons are still the same and always will be. Please do not bring Margaret into our differences. She is very happy. I am devoted to her and she loves me and her life is a normal, healthy, happy one. If I have to starve she will not want. I am sorry to hear you are not well and hope you will soon recover. Please accept this as a final answer."

The husband replied on Apr. 17 by a letter asking her to reconsider her refusal and making it plain that if she returned she could come back on the same conditions as before, meaning thereby that there would be separate bedrooms and no sexual intercourse. The wife did not accede to this request, and accordingly the order of Oct. 12, 1954, was discharged on Aug. 23, 1957, on the ground that the husband had ceased to be in desertion. The wife has never appealed against this order, and when she issued her present complaint conceded and still concedes that the husband is no longer in a state of desertion.

If the wife is in desertion that is the end of the matter; but since both questions to which we have referred have been fully argued it is right to express an opinion on them. The first question depends on the effect of the Summary Jurisdiction (Married Women) Act, 1895, which provides a remedy in the courts of summary jurisdiction for wives whose husbands have wrongfully failed to maintain them. Formerly a wife had no direct remedy in the common law courts, although she

could, if she were able to do so, pledge her husband's credit for the necessaries of life. Since the passing of the Matrimonial Causes Act, 1884, a wife has been able to obtain periodical payments in cases where her husband has disobeyed orders for restitution of conjugal rights. The existing statutory duty was stated in the Summary Jurisdiction (Married Women) Act, 1895, ss. 4, 5 and 7, as follows:

> " 4. Any married woman . . . whose husband shall have been guilty of . . . wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain . . . may apply to any court of summary jurisdiction . . . for an order . . . under this Act . . .
>
> " 5. The court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz. . . . (c) A provision that the husband shall pay to the applicant personally, or for her use to any officer of the court or third person on her behalf, such weekly sum not exceeding [£5] as the court shall, having regard to the means both of the husband and wife, consider reasonable . . .
>
> " 7. A court of summary jurisdiction . . . may, on the application of the married woman or of her husband . . . from time to time increase or diminish the amount of any weekly payment ordered to be made . . . If any married woman upon whose application an order shall have been made . . . shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged."

There can be no doubt that this was intended to give a remedy in support of the wife's common law right to maintenance at the hands of her husband. The common law right was not a right to an allowance but to be supported by being given bed and board, and under the statute a wife could not complain of wilful neglect to maintain because the husband was foolish enough to take the housekeeping out of her hands any more than she could have done at common law: see *Jackson* v. *Jackson* (1). The remedy for wilful neglect to maintain was at first available only when such neglect in the joint home had driven the wife to leave the husband. This was remedied by an amendment of the statute in 1925 in order to deal with the case where the wife had nowhere to go and needed immediate relief: see s. 1 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, which also, by s. 2 (2), provided that if she went back and lived with her husband the separate allowance ceased to be payable as from the date of resumption of cohabitation.

The offence charged is that as between husband and wife there has been a dereliction of that duty of maintenance, and questions have often arisen as to the circumstances in which the husband may be properly found guilty of the offence, which is in itself a form of matrimonial misconduct. In most cases where the spouses are living apart from one another the question whether there has been wilful neglect to maintain the wife depends on the same facts as the question whether or not there has been desertion on the part of either, and there is no point in taking proceedings on both grounds. We have said " most cases " for where there is a separation deed containing provisions for the support of the wife she will not be left to sue her husband under the deed if he defaults in payment, but can apply for an order on the ground of his wilful neglect to maintain her. Even if he complies with his obligations under the deed, the wife may show a change of circumstances since the execution of the deed and apply for an order: see *Tulip* v. *Tulip* (2) where the earlier authorities are reviewed, particularly in the

(1) 96 J.P. 97; [1932] All E.R. Rep. 553.
(2) [1951], 2 All E.R. 91; [1951] P. 378.

dissenting judgment of HARMAN, J. Nevertheless, where the parties are living apart by agreement the husband is not necessarily guilty of wilful neglect to maintain his wife: see *Baker* v. *Baker* (1), approved by the Court of Appeal in *Chapman* v. *Chapman* (2) (unreported, but cited in *Pinnick* v. *Pinnick* (3) and *Starkie* v. *Starkie* (*No. 2*) (4)).

In several cases in the Divisional Court of the Probate, Divorce and Admiralty Division, including this case, the learned President has pointed out the difference between the cases where the duty to maintain a wife has been enforced under the Summary Jurisdiction (Married Women) Act, 1895, and those cases where the obligation has been enforced by the National Assistance Board under the National Assistance Act, 1948. The same distinction has been drawn in the last type of case by LORD GODDARD, C.J., in the Divisional Court of the Queen's Bench Division in *National Assistance Board* v. *Parkes* (5). It has been decided in the last-mentioned case, and the decision was affirmed on appeal to this court, that having regard to the language of s. 42 and s. 43 of the Act of 1948 a husband is liable to maintain his wife as against the National Assistance Board notwithstanding an agreement to live apart without maintenance. Thus, under that Act the right to maintain subsists independently of the fault of the husband: see *National Assistance Board* v. *Parkes* (5). There it was held in this court that since s. 42 (1) of the Act provides that a man shall be liable to maintain his wife the board may bring any husband of an assisted wife before the court under s. 43 (1), but once he is before it the court by s. 43 (2) " shall have regard to all the circumstances " including any circumstance recognised by the law as sufficient to relieve a husband of his obligation to maintain his wife. It was further held that desertion or adultery by the wife is a highly relevant circumstance—and it may be a conclusive circumstance—against making an order. The authorities, in our opinion, are consistent only with the view of the law repeatedly enunciated by the learned President and his predecessor LORD MERRIVALE—that whatever may be the position as against the public authority, nevertheless, as between the husband and the wife he cannot be found guilty of wilful neglect to maintain her unless he is a wrongdoer. The wrongdoing may, however, consist of the very fact of a failure to maintain. There need be no other matrimonial offence imputed to the husband. The way the court has interpreted the National Assistance Act, 1948, seems to be in accordance with practical sense, because otherwise a husband and wife might agree together to part without maintenance with the intention that the wife might receive her maintenance from the community through the hands of the National Assistance Board without the husband suffering any diminution of his income. In our judgment the authorities are consistent on this point, for the dissenting opinion of DENNING, L.J., expressed in *Price* v. *Price* (6) and in *National Assistance Board* v. *Parkes* (5) to the effect that the Probate, Divorce and Admiralty Division has at all times misunderstood the liability of husbands to maintain wives in making orders under the relevant statutes has not, so far as we know, found support. The authorities are discussed fully in the judgment of the learned President in *Pinnick* v. *Pinnick* (3).

There is in this case no agreement to live apart, but there is a de facto separation which is explained by the wife's state of neurosis, because of which, as the learned stipendiary found, the wife would be risking grave consequences to her

(1) (1949), 66 (pt. 1) T.L.R. 81.
(2) (Apr. 4, 1951), unrep.
(3) 121 J.P. 256; [1957] 1 All E.R. 873.
(4) 118 J.P. 59; [1953] 2 All E.R. 1519.
(5) [1955] 3 All E.R. 1; [1955] 2 Q.B. 506.
(6) 115 J.P. 468; [1951] 2 All E.R. 580; [1951] P. 413.

mental health if she returned to her husband at the present time. She maintains that in the circumstances if he does not maintain her apart from him he is guilty of wilful neglect to maintain just as much as if she were separated from him by necessity. Examples of separation by necessity come readily to mind where the occupation of the husband makes it necessary for him to spend long periods apart from his wife by reason of his absence at sea or otherwise away from his home. The changes and chances of life may often, where there is a separation of necessity, put on the husband the obligation to support his wife when she is separated from him, and if he does not do so he will be guilty of the offence with which he is charged. This duty must surely subsist if separation is forced on the parties by illness which compels residence in hospital, and this would be the same whatever the nature of the illness, even if it be mental disorder, provided always that the intention of the absent spouse to return to the other continues. Compare the observations of SINGLETON, L.J., in *Keeley* v. *Keeley* (1). We see no reason why the obligation to maintain which exists when the husband and wife are living together should be affected by an enforced separation. If the husband does not maintain his wife while in the home he is clearly in default under the statutes, and an enforced separation of itself can make no difference. We would, therefore, with all respect to the opinion expressed by the Divisional Court and by the learned stipendiary magistrate, have been of opinion that if the wife was not in desertion the husband must, in the circumstances of this case, have committed the offence with which he is charged, subject to consideration of the relative means of the parties.

The remaining question is, therefore, whether the wife is in desertion since she failed to respond to the husband's request to return contained in his letter of Apr. 17, 1957. Accepting the finding of the learned stipendiary, confirmed by the Divisional Court, that because of her neurosis the wife would be risking grave consequences to her mental health if she returned to her husband at the present time, the fact remains that there is a de facto separation between the parties and that all that is necessary to make the wife into a deserter is the intention to desert. Compare *Pardy* v. *Pardy* (2), where a separation which began consensually was altered so as to put the husband in desertion by proof of a supervening animus deserendi. SIR WILFRID GREENE, M.R., said:

> " The first question which arises is whether or not it is possible in law for a separation, which began by being consensual, to acquire the character of desertion without a previous resumption of cohabitation. Looking at this question on principle and apart from authority, I can see no reason why the answer to it should not be in the affirmative. The word ' desertion ' may describe an act, or it may describe a state. For the act of desertion both the factum of separation and the animus deserendi are required. A de facto separation may take place without there being an animus deserendi, but if that animus supervenes, desertion will begin from that moment unless, of course, there is consent by the other spouse. Thus a husband who leaves his wife for a business voyage may nevertheless become guilty of desertion without the necessity of a previous return. All that is required to establish desertion in such a case is the presence of a supervening animus deserendi (a matter to be inferred from the words and conduct of the deserting spouse), a continuance of the de facto separation, and the absence of consent by the other spouse."

(1) [1952] 2 T.L.R. 756.
(2) [1939] 3 All E.R. 779; [1939] P. 288.

That there may be physical inability to end the desertion does not prevent it remaining desertion: see *Drew* v. *Drew* (1), where the deserting husband was in prison. This case was cited with apparent approval by LORD PORTER in *Crowther* v. *Crowther* (2) where the question was whether a husband was in desertion who during part of the material time was detained under a reception order in a mental hospital. It had been held in the courts below that a person of unsound mind could not have the intention to desert, but their Lordships were of opinion that it was nevertheless open to the petitioner to prove if she could that the respondent, notwithstanding that unsoundness of mind, was capable of having an intention to desert his wife.

In this case the only medical evidence called was that of Dr. Hendy, who expressly said that the wife's condition was neurotic rather than psychotic, and we think that her evidence as well as that of Dr. Hendy went to show that she was capable of making a rational decision to desert. The letters which she wrote to her husband support this view. So also does her own evidence given at the hearing before the learned stipendiary. The following questions and answers are taken from the transcript of her evidence:

> "Q.—At any rate, you are determined that you cannot live with him at the present time? A.—Yes. Q.—And never can? A.—Definitely not. Q.—Do you accept that he wants to live with you? A.—Yes. Q.—That he has a home for you to go into? A.—Yes. Q.—That he has kept the home in the hope that you will go back to him? A.—I have repeatedly told him I can't go back. Surely, he should have accepted that by now. Q.—And whatever promises he made to you with regard to how he would treat you if you came back to him, you still would not have him back? A.—No. Q.—Do you think, under those circumstances, it is fair to ask him to maintain you? A.—Yes."

She then gave reasons in support of her contention that it was fair to ask for maintenance. As to the wife's capacity to make a rational decision, the stipendiary said:

> "It is clear from the evidence and indeed in no way in dispute that the wife is capable of making a rational decision and of forming an intention to desert."

The learned President did not, however, consider that this finding was justified by the evidence. He based his decision on an answer given to the court in cross-examination by Dr. Hendy. The question was in this form:

> "As I understand it, you say that this lady is rational and in normal mental health except so far as it relates to her husband? A.—Yes, and as I said just now, to other men."

This question was phrased in an unfortunate form, for it contains two questions. The answer "Yes", if taken to apply to both parts of the question, no doubt qualifies in an important respect the doctor's evidence that the wife was rational, but having regard to the rest of his evidence and the express finding of the learned stipendiary already read that the rationality of the wife was not in dispute, we cannot regard this answer as sufficient to destroy the effect of Dr. Hendy's evidence in this essential matter, consistent as it is with the view which the magistrate must have formed of the effect of the evidence of the wife herself, and of her letters and her demeanour in court. As SIR WILFRID GREENE, M.R., said in *Pardy* v. *Pardy* (3), the animus deserendi must be inferred from the words

(1) (1888), 13 P.D. 97.
(2) [1951] 1 All E.R. 1131; [1951] A.C. 723.
(3) [1939] 3 All E.R. 779; [1939] P. 288.

and conduct of the deserting spouse. In the present case we are of opinion that the conclusion of fact reached by the stipendiary on this issue was amply justified by the evidence before him. The attitude of the wife went far beyond saying "I cannot return to you at present". She added in effect "and I never will". This expression of her fixed intention appears both from the letters and her statements in court. It had all the appearance of a rational conclusion: it was reached, as is shown by her letter of Apr. 3, 1957, on the advice of the psychiatrist, in whom she trusted. She is not a person of unsound mind, as was for a time the husband in *Crowther* v. *Crowther* (1). She has made a deliberate choice for all time, and she cannot properly complain of the natural consequences of her act.

This is no doubt a strong case, for the neurosis of the wife is severe and may be incurable. It may appear hard, therefore, that she should be guilty of desertion if she expresses herself as unwilling ever to return to her husband, but we think that the conclusion that she is in desertion is inevitable on the evidence as it stands at present. We think, moreover, that there is support for the view which we have formed in the decision of the Divisional Court, consisting of the learned President and BYRNE, J., in *Leng* v. *Leng* (2). It was there emphasised that the neurotic condition of a husband and nothing more is not in law sufficient ground for a wife's refusal to live with him. The learned President pointed out that unless that were so the ultimate result of a justices' order might in effect be a divorce on the ground of neurosis. In this case we do not think that the neurotic wife can in law justify a refusal ever to return to cohabitation now that the state of desertion for which her husband was responsible has been terminated. From this it follows that she is herself in desertion.

In the result, although for different reasons from those expressed by the Divisional Court, we would dismiss the appeal.

Appeal dismissed.

Solicitors: *Dawson, Loncaster & Co.*, Hull; *Smith & Hudson*, for *Williamson, Stephenson & Hepton*, Hull.

H.S.

(1) [1951] 1 All E.R. 1131; [1951] 2 A.C. 723.
(2) 110 J.P. 395; [1946] 2 All E.R. 590.

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COURT OF CRIMINAL APPEAL

(LORD PARKER, C.J., ASHWORTH AND HINCHCLIFFE, JJ.)

October 2, 5, 1959

R. *v.* THOMAS

Criminal Law—Appeal—Further evidence—Evidence of matters arising since conviction—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 9, *s.* 19.

Where a convicted person desires to call further evidence relating to matters which have arisen since conviction, semble, his proper course is to lodge a petition with the Home Secretary so that the Home Secretary can, if he thinks proper, refer the case to the Court of Criminal Appeal under s. 19 of the Criminal Appeal Act, 1907.

R. v. *Robinson*, (1917), 81 J.P. 152, not followed.

APPEAL against conviction.

The appellant, Anthony Hogarth Thomas, was convicted on Jan. 24, 1959, on three counts of an indictment for child stealing, abduction of and indecent assault on a girl aged thirteen. He appealed against conviction on two main grounds, viz., (i) he applied for leave to call additional evidence which, if accepted, would establish that the evidence given by the girl at the trial was false and had been admitted by her to be false, and (ii) that the jury had been wrongly invited to consider as possible corroboration matters which could not properly be so regarded. The appeal came on for hearing on Oct. 2, 1959. The court then heard further evidence de bene esse of three neighbours of the girl, who stated that after the trial the girl had told them that her evidence at the trial had been in some respects untrue. The court, at the conclusion of the hearing, said that the appeal would be allowed and that reasons for their decision would be given later.

N. R. Blaker for the appellant.
R. Stock for the Crown.

Cur. adv. vult.

Oct. 5. **ASHWORTH, J.**, after reviewing the facts and stating the two main grounds of appeal set out above, continued: We deal first with the question of additional evidence. It became clear at an early stage of the hearing before us that part of this evidence related to matters which were said to have occurred after the appellant's conviction and sentence; such evidence could not, therefore, have been laid before the jury at the appellant's trial. On the other hand, the other part of the proposed evidence related to matters which were said to have occurred before the appellant's trial. So far as the latter part of the proposed evidence is concerned, no procedural difficulty arose; s. 9 of the Criminal Appeal Act, 1907, expressly provides for the reception of such evidence. In regard, however, to matters which have occurred since an appellant's conviction the Act of 1907 contains no express provision. Notwithstanding the decision in *R.* v. *Robinson* (1) we are inclined to think that when a convicted person desires to rely on such evidence his proper course is to lodge a petition with the Home Secretary so that, if thought fit, action may be taken in accordance with s. 19 of the Act of 1907. In the present case we decided to hear the evidence de bene esse and to postpone any ruling as to the court's power or discretion to receive it. Having heard the evidence, we are of opinion that it was not of sufficient weight or reliability to be acceptable and that, in so far as it could have been laid before

(1) 81 J.P. 152; [1917] 2 K.B. 108.

the jury at the appellant's trial, it would not have affected their conclusion. Accordingly it is unnecessary to express any further opinion as to the circumstances in which this court either can or should receive evidence of events occurring after a conviction.

[HIS LORDSHIP then turned to the question of corroboration, concluding that the jury were invited to regard two matters as capable of constituting corroboration which could not properly be so regarded and that a careful study of the evidence aroused in the mind of the court serious misgivings as to the appellant's guilt.]

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal*; *Sharpe, Pritchard & Co.*, for *C. P. Brutton*, Dorchester (for the Crown).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND HINCHCLIFFE, JJ.)

October 6, 1959

Re SHUTER

Extradition—Discharge of fugitive—Detention—Case remitted to magistrate to hear evidence on law of Kenya—Committal to prison under fresh warrant to await return to Kenya—Detention for over one month after committal—"Sufficient cause"—Fugitive Offenders Act, 1881 (44 & 45 *Vict.*, c. 69), *s.* 7.

By s. 7 of the Fugitive Offenders Act, 1881: "If a fugitive who, in pursuance of this Part of this Act, has been committed to prison in any part of Her Majesty's Dominions to await his return, is not conveyed out of that part within one month after such committal, a superior court, upon application by or on behalf of the fugitive . . . may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody."

On June 17, 1959, the applicant was committed to prison by the Chief Metropolitan Magistrate under the Fugitive Offenders Act, 1881, to await his removal to Kenya where, it was alleged, he had committed serious offences. On an application by the applicant for habeas corpus, the court remitted the matter to the magistrate to hear evidence on the law of Kenya, which the Chief Magistrate did on July 15, when he committed the applicant to prison under a fresh warrant. An air passage was booked on July 21 by the Colonial Office for the applicant and two officers of the Kenya Police, who were on leave in the United Kingdom and undertook to escort the applicant back to Kenya, on an aircraft due to leave England on Aug. 15. The applicant's solicitor was informed of these arrangements and raised no objection. The air passage was, however, cancelled by the British Overseas Airways Corporation, and the applicant was still in custody on Aug. 17. The applicant applied to be discharged under s. 7 of the Act of 1881 on the ground that he had not been conveyed out of the United Kingdom within one month of the date of committal.

HELD: (i) that the word "may" in s. 7 was to be construed as "shall," and, therefore, the section prohibited a fugitive being detained in custody for more than a month from the date of committal, unless sufficient cause was shown to the contrary; (ii) "sufficient cause" did not relate solely to something outside the control of the relevant authorities, but entitled the court to consider the reasonableness of what was being done; (iii) in the circumstances of the present case, particularly having regard to s. 6 of the Act, the applicant was not being detained unreasonably; and the application for discharge would, therefore, be refused.

APPLICATION for discharge pursuant to s. 7 of the Fugitive Offenders Act, 1881.

On June 17, 1959, the applicant, Victor Charles Shuter, appeared before the Chief Metropolitan Magistrate on a warrant issued by the Kenya government in respect of some eleven alleged offences said to have been committed in Nairobi at the end of 1958 and the beginning of 1959. The Chief Magistrate, having heard the evidence, committed him to Brixton Prison to await his removal to Kenya. On June 30 an application was made to a Divisional Court for habeas corpus on the ground that the Chief Magistrate had committed the applicant without any or sufficient evidence as to the law of Kenya, and an application in the alternative was made under s. 10 of the Fugitive Offenders' Act. On July 7 the Divisional Court refused any relief under s. 10, but remitted the matter to the magistrate to hear evidence as to the law of Kenya. He did so on July 15, and on that date the applicant was committed to Brixton Prison to await his return to Kenya under a fresh warrant. When August 17 came, which was over a month from the date of the committal order, he was still in prison, and appealed to the Divisional Court, saying that in those circumstances he ought to be released.

According to an affidavit by a senior legal assistant in the Colonial Office, a Mr. Rushford, it appeared that on July 15 the applicant's solicitor had got into touch with Mr. Rushford and suggested that it would be convenient to the prisoner if he was sent back to Kenya at as late a date as possible because of his fear of some recriminations as a result of views he had expressed while he was in Kenya. However, on the same day the solicitor told Mr. Rushford to forget about that and that he did not want any special arrangements made. Mr. Rushford then sought an escort and found that two Kenya police officers were due to return from leave on August 12 and 16 respectively. On July 21 he booked passages with B.O.A.C. for the applicant and his two escorts for August 16. That air passage was cancelled and in fact the aircraft on which they would have left went on August 17. By then this application was being made, and those bookings were accordingly cancelled. Mr. Rushford, in booking for August 16, was aware that this meant that the time limit laid down under the section would just be exceeded. He considered, however, that this was preferable to curtailing the leave of an officer of the Kenya police. He was also influenced by the request originally made and by the fact that if Shuter were to leave on August 14 or 15 he would not have come before a magistrate in Kenya before Monday, August 17. Mr. Rushford wrote to the solicitors for the applicant stating what the arrangements were, and there was no objection.

Butter for the applicant.

J. C. Mathew for the Secretary of State for the Colonies.

M. D. L. Worsley for the governor of Brixton Prison.

LORD PARKER, C.J.: This is an application made on behalf of one Victor Charles Shuter, now detained in Brixton Prison, for an order that he be discharged pursuant to s. 7 of the Fugitive Offenders Act, 1881. The matter arises in this way. As long ago now as June 17, 1959, the applicant appeared before the Chief Magistrate at Bow Street on a warrant issued by the Kenya Government in respect of some eleven alleged offences said to have been committed by the applicant in Nairobi, Kenya, at the end of 1958 and the beginning of 1959. The Chief Magistrate, having heard the evidence, committed him to Brixton Prison to await his removal to Kenya, and, from the schedule to the warrant, it is perfectly clear that the offences alleged were very serious offences. On June 30 an application was made to this court for habeas corpus on the ground that the Chief Magistrate had committed the applicant without any

evidence, or any sufficient evidence, as to the law of Kenya which would bring into operation the Fugitive Offenders Act, 1881, and application in the alternative was made under s. 10 of the Act. This court, having heard the application (1) on July 7, refused any relief under s. 10, but came to the conclusion that no satisfactory evidence had been called before the magistrate as to the law of Kenya, and they thereupon remitted the matter to the magistrate to hear evidence as to that law. He did so on July 15, and on that date, which is the important date in these proceedings, the applicant was committed to Brixton Prison to await his return to Kenya under a fresh warrant. What has given rise to this application is that, the committal order being dated July 15, when Aug. 17 came, which was over a month from the date of the committal order, the applicant had not been conveyed out of the United Kingdom (he was still in prison), and he applies now to this court saying that in those circumstances he ought to be released.

Section 7 of the Fugitive Offenders Act, 1881, is in these terms:

> " If a fugitive who, in pursuance of this Part of this Act, has been committed to prison in any part of Her Majesty's dominions to await his return, is not conveyed out of that part within one month after such committal, a superior court, upon application by or on behalf of the fugitive, and upon proof that reasonable notice of the intention to make such application has been given, if the said part is the United Kingdom to a Secretary of State, and if the said part is a British possession to the governor of the possession, may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody."

The application is made on the basis that there is not shown in this case any sufficient cause to the contrary and, accordingly, it is said that this court should order the applicant's immediate discharge out of custody. What apparently happened is stated in an affidavit of Mr. Rushford, a senior legal assistant in the Colonial Office. It appears that on July 15, the date of committal, the applicant's solicitor got in touch with Mr. Rushford and suggested that it would be convenient to the applicant if he was sent back to Kenya at as late a date as possible, because of the possibility of recriminations as a result of views which he had expressed while in Kenya. However, on the same day the solicitor told Mr. Rushford, in effect, to forget about that, and that the applicant did not want any special arrangements made. Mr. Rushford then sought an escort, and he found that two Kenya police officers, Mr. Haddick and Mr. Halliday, were due to return from leave on Aug. 12 and 16 respectively; and on July 21 he booked a passage with British Overseas Airways Corporation for the applicant and for his two escorts, for Aug. 16. That air passage was later cancelled by the British Overseas Airways Corporation, who substituted therefor a passage on an aircraft due to leave on Aug. 17, and, in fact, the aircraft on which they would have left went on Aug. 17. By that time, however, this application was being made, and, accordingly, the passage for Aug. 17 was cancelled. In regard to booking the passage for Aug. 16, Mr. Rushford said:

> " In so doing I was aware that this would mean that the time limit laid down in s. 7 of the Fugitive Offenders Act, 1881, would just be exceeded. I considered, however, that this was preferable to curtailing the leave of an officer of the Kenya Police, a force which I was aware had been working under conditions of great stress for a long time. I was also influenced in this decision by the request originally made to me by the [applicant's solicitor] [i.e., the request that the applicant should be sent out as late as possible]

and by the fact that I considered that even if the [applicant] were to leave the United Kingdom on Aug. 14 or 15, 1959, he would not come before a magistrate in Kenya before Monday, Aug. 17, 1959."

Mr. Rushford went on to point out that he wrote to the solicitor for the applicant stating what the arrangements were (namely, for Aug. 16), and that there was no objection at all.

The first matter which arises here is as to the true construction of s. 7. Counsel for the applicant maintains that it is a section which does not permit the detention of a fugitive for more than one month unless sufficient cause is shown to the contrary. As against that, two arguments are put forward. First, it is said that that is not the effect of the section, and that the reference there to one month is merely a reference to the time when an application may first be made, i.e., the application can be made at any time after a month. It is also said that the words "may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody" are not to be read as counsel for the applicant would have them read, namely, as "shall, unless sufficient cause is shown to the contrary, order the fugitive to be discharged". It is submitted that there is a complete discretion: anything may be taken into consideration, save only that, if sufficient cause is shown to the contrary, then the discretion is cut down to that extent. I can well see the force of those two arguments, the argument in regard to the month and the argument as to the words "may, unless"; but I have come to the conclusion that by far the most natural interpretation of this section is the interpretation for which counsel for the applicant contends.

We were referred also to s. 5 and s. 6 of the Act of 1881. I need not refer in detail to those sections, but, reading them with s. 7, I can see no reason for reading the period of one month in s. 7 as referring merely to the time when the application can be made. It seems to me that, in ordinary language, s. 7 is saying that there is no jurisdiction for holding a man beyond one month unless sufficient cause is shown. As regards the meaning of the word "may", I confess that at one time I was influenced by the argument of counsel for the Governor of Brixton Prison, but, if the discretion is completely at large and "may" means "may", then it would be quite unnecessary to have the words "unless sufficient cause is shown to the contrary". Secondly, it is a case where what is sufficient cause in any particular case may well depend on opinion and discretion. I think that the natural meaning is "shall, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody".

The question then remains whether the facts disclosed by Mr. Rushford's affidavit and the circumstances of the case amount to a "sufficient cause . . . to the contrary". As regards that, counsel for the applicant maintains that "sufficient cause", in s. 7, can only relate to something which is quite outside the control of the relevant authorities: the cancellation of the flight of the aircraft on the last day might be a sufficient cause, or the illness of the fugitive and matters of that sort which are wholly outside the control of the relevant authorities. If that is right, says counsel, it is perfectly plain here that everything that was done, except for the cancellation of the aircraft which was to leave on Aug. 16, were matters within the control of the authorities, and he points out that Mr. Rushford in fact well knew that he was going against the section, but found that it was convenient to do so.

For my part, I think that that interpretation of "sufficient cause to the contrary" is too narrow. It seems to me that within those words can be brought matters of reasonableness. If one looks back to s. 6, it becomes perfectly clear that the escort or the authorities who are going to receive the fugitive may

themselves require the governor of the prison where he is detained to detain him for a reasonable time. I say that because, by s. 6, provision is made for a second warrant being issued, namely, a warrant by the Secretary of State in a case such as this, handing the fugitive over to the escort, and the section goes on to provide, in the last paragraph:

> "The governor or other chief officer of any prison, on request of any person having the custody of a fugitive under any such warrant, and on payment or tender of a reasonable amount for expenses, shall receive such fugitive and detain him for such reasonable time as may be requested by the said person for the purpose of the proper execution of the warrant."

It is true that as far as this court knows, no such warrant has been issued in this case and that the applicant is still held under the original committal order. But it is to be observed that, if such a warrant had been issued in this case, the Colonial Office acting for the Kenya Government or the police officers, the escort, could themselves, as I understand that section, have produced the warrant to the Governor of Brixton Prison and said to him, in effect: "Please hold this man for a reasonable time". Accordingly, it seems to me that, when one is construing the words in s. 7, "unless sufficient cause is shown to the contrary", one is entitled to take into account questions such as reasonableness in all the circumstances. Once one gets as far as that, as a matter of construction, it seems to me quite plain that, on the facts disclosed in Mr. Rushford's affidavit, no one could say that he was not acting perfectly reasonably in making the arrangements which he did. One cannot shut one's eyes to the fact that this is only a matter of a day or two's delay and that the alleged offences are serious offences. There is also the fact that the applicant's own solicitor was informed of the arrangements and took no objection. That latter observation is subject to the comment that he might well not have had s. 7 in mind, but, when one is thinking of this matter in terms of reasonableness, it is some evidence that what was being done was perfectly reasonable and that the applicant was not being detained for an unreasonable time. In these circumstances, I would refuse the application.

ASHWORTH, J.: I agree.

HINCHCLIFFE, J.: I also agree.

Application refused.

Solicitors: *Hopwood, Hilbery, Mote & Leedham-Green; Charles Russell & Co.; Director of Public Prosecutions.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND HINCHCLIFFE, JJ.)

October 5, 6, 1959

R. *v.* BURNHAM JUSTICES, *Ex parte* ANSORGE

Magistrates—Plea of Guilty by letter—Two informations relating to same circumstances—Document headed "Statement of Facts" setting out both alleged offences sent to defendant—Notice of plea of Guilty—Reference by defendant to one information only—Conviction on both informations—Certiorari—One conviction quashed—Magistrates' Courts Act, 1957 (5 & 6 *Eliz.* 2, *c.* 29), *s.* 1 (1).

Two informations arising out of the same circumstances were preferred against the defendant, the first charging her with causing a motor car to stand on a road so as to cause unnecessary obstruction thereof and the second with contravening parking regulations. When the summons was served on the defendant in respect of both informations, it was accompanied by a "Statement of Facts" in which it was stated that, if the applicant wished to plead Guilty to the charge of "motor car (a) causing unnecessary obstruction and (b) waiting in a restricted area" the facts therein set out would be read to the court and would constitute the evidence adduced against her. It was also accompanied by a "Notice of Plea of Guilty" which the defendant could fill up if she chose to plead Guilty and in which she could set out any mitigating circumstances. The defendant completed and returned this notice to the court, which then read: "I have read the statement(s) of facts relating to the charge(s) of motor car waiting in a restricted area . . . I plead Guilty to the charge(s) . . ." and she then set out mitigating circumstances which could have been common to both informations. She never made any reference to the charge of causing unnecessary obstruction. The magistrates' court treated the defendant's plea as a plea of Guilty to both informations and fined her on both informations in her absence. On motion by the defendant for certiorari to quash both convictions,

HELD: (i) that the provisions of s. 1 (1) of the Act of 1957 must be strictly complied with, and that, as the only plea of Guilty before the magistrates was in respect of the second information, the conviction on the first information must be quashed; (ii) that the conviction on the second information must stand, as certiorari could not lie for want of jurisdiction as the magistrates had jurisdiction to inquire into the allegations raised by the information, nor could it lie on the ground of error of law, because there was no such error on the face of the record, and, even if certiorari did lie, the court would not, as a matter of discretion, grant it in the circumstances of the present case.

MOTION for certiorari.

The applicant, Lady Wenonah Hardwick Ansorge, was summoned to appear before the magistrates' court for the petty sessional division of Burnham, sitting at Beaconsfield, to answer two informations (i) that on Sept. 1, 1958, she unlawfully used a motor car on a road called Station Parade, at Gerrards Cross, in contravention of the Motor Vehicles (Construction and Use) Regulations, 1955, reg. 89, in that being the person in charge of the motor car she caused it to stand on the road so as to cause unnecessary obstruction thereof contrary to reg. 104, and (ii) that on the same date and at the same place she contravened the London Traffic (Restriction of Waiting) (Station Parade, Gerrards Cross) Regulations, 1952 in that she did otherwise than on the direction or with the permission of a police officer in uniform cause a motor car to wait at a time between 10 a.m. and 8 p.m. on part of Station Parade, contrary to reg. 3. The summonses, when served on the applicant were, pursuant to the Magistrates' Courts Act, 1957, s. 1 (1) (ii), accompanied by a statement of facts in which the applicant was informed that if she wished to plead guilty to the charge of "motor car (a) causing unnecessary obstruction (b) waiting in a restricted area" without appearing

before the court, the facts therein set out would be read out in open court. The applicant filled in a form headed notice of plea of guilty so that it read as follows:

"Plea of Guilty

"I have read the statement(s) of facts relating to the charge(s) of motor car waiting in a restricted area which is/are to be heard by the magistrates' court on Oct. 14, 1958. I plead guilty to the charge(s) and I desire that the court should dispose of the case in my absence. I wish to bring to the court's attention the mitigating circumstances set out below."

The mitigating circumstances were circumstances common to both informations.

The magistrates' court treated the applicant's plea as a plea of guilty to both charges and fined her £5 on the first information and £2 on the second information.

The applicant obtained leave to apply for an order of certiorari to quash both convictions.

Henry Summerfield for the applicant.

LORD PARKER, C.J., stated the facts and continued: While I have every sympathy with the magistrates, the fact of the matter is that the provisions of s. 1 of the Magistrates' Courts Act, 1957, have to be complied with strictly, as this court has already said on more than one occasion; and here the only express plea of guilty before them was in regard to the second information. Accordingly, it seems to me, so far as the first information is concerned that they in fact found her guilty and fined her in her absence and without any evidence whatsoever, and in my judgment the conviction on the first information must be quashed.

The matter does not, however, rest there because counsel goes further and urges that the second conviction ought also to be quashed. He puts it in this way: True these are two separate offences; they are in different terms; they attract different penalties; they are under different statutory provisions, but here if one convicted on the first information and then went on to deal with and convict on the second information, it would on the facts of this case be putting the applicant in peril twice. I say "on the facts of this case" because it seems clear here that the offence with which she was charged under the parking regulations would also amount to unreasonable obstruction under the construction and use regulations. Accordingly, counsel strongly relies on the general principle which, I think, in the case of a conviction otherwise than on indictment is really to be found in the nemo bis vexari debet principle; and he referred the court to *Welton* v. *Taneborne* (1). In that case the respondent was convicted of driving a motor car in a manner dangerous to the public, and he was fined. It was then sought to charge him with an offence against what was then s. 9 (1) of the Motor Car Act, 1903, which was driving the car at over twenty miles an hour. It appeared that the magistrates in convicting of the dangerous driving had taken the speed into consideration, and accordingly in those circumstances the court by a majority decision held that it would be wrong to try the respondent again on the same facts, albeit under a different statute.

The matter, however, does not rest there because broadly speaking certiorari only lies where there is lack of jurisdiction or where there is an error of law on the face of the record. Before the magistrates can decide whether to convict or not to convict on the second information they must inquire into the matter to see what are the facts. If, having inquired into the matter, they find that the facts are the very facts which have given rise to the conviction on the first information, their proper course would be to proceed no further and, if they did proceed to convict and sentence, an appeal would lie to quarter sessions. That they have

(1) (1908), 72 J.P. 419.

jurisdiction to enter into the matter and ascertain what are the facts there can be no doubt, and accordingly certiorari would not lie for want of jurisdiction. If and so far as they went wrong in law, certiorari would only lie if there was an error of law on the face of the record and, looking at the record in this case, the two offences under the two different regulations might, for all this court could tell, have taken place at quite different times albeit on the same day.

In addition to that there remains the question whether this is a case in which the court should exercise its discretion to grant an order. A very similar situation arose in *R.* v. *Campbell, Ex p. Nomikos* (1), to which counsel referred the court. In that case it was said that the master of a cargo ship had contravened certain timber carrying regulations in regard to the height of the stowage on deck. In fact two informations were preferred, one in regard to the timber on the fore deck and one in regard to the timber on the quarterdeck. The court held that there was only one offence; it could not be divided up according to the different parts of the ship. It was argued that, that being so, the conviction and the fine on the second information should be quashed. In dealing with that, LORD GODDARD, C.J., refers specifically to this question whether certiorari would lie in such a case, and points to the fact that the magistrates there, as I think here, would have had to go into the matter to ascertain that the same offence was involved in both cases. As regards discretion, he said this:

> "Another ground for refusing certiorari in this case is that I know of no case where a plea of guilty has been entered and certiorari has been granted. No one can suggest that in this case the magistrate did anything wrong. She has filed an affidavit explaining exactly what happened. Competent counsel being before her and entering a plea of guilty for his client, she naturally proceeded to record a conviction and consider what penalty should be imposed. In my opinion it would be quite wrong to issue certiorari in this case after that has been done, and also in my view the court has no power to order certiorari in this case. Certiorari is always, it should be remembered, a discretionary remedy. Although in the history of that writ the courts were inclined at one time rather to depart from the fact of its being a discretionary remedy, *R.* v. *Stafford JJ., Ex p. Stafford Corpn.* (2), to which counsel for the applicant referred, shows that the Court of Appeal were, if I may say so, on the right lines in getting certiorari back to a matter of discretion. It may very often be that the facts are such that the discretion can be exercised in only one way, that is to say, it would not be a judicial exercise of discretion to decide against the person by whom the exercise of the discretion is sought. That is sometimes misunderstood."

It seems to me that every word that LORD GODDARD said there applies in the present case. It would be very novel to grant certiorari in a case where an applicant has deliberately pleaded guilty, and for those reasons I have come to the conclusion that the second conviction should stand. Accordingly, the effect of this momentous case is that the first conviction will be quashed, the second will remain, and the applicant will only be fined £2.

ASHWORTH, J.: I agree.

HINCHCLIFFE, J.: I also agree.

Order accordingly.

Solicitors: *Amery-Parkes & Co.*

T.R.F.B.

(1) 120 J.P. 320; [1956] 2 All E.R. 280.
(2) 104 J.P. 266; [1940] 2 K.B. 33.

CHANCERY DIVISION

(DANCKWERTS, J.)

October 6, 1959

EAST HAM CORPORATION *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT

Housing—Requisitioned premises—Release from requisition—Contribution towards local authority's expenses by way of compensation—Rate of contribution by Ministry of Housing and Local Government—Requisitioned Houses and Housing (Amendment) Act, 1955 (3 & 4 Eliz. 2, c. 24), s. 10 (1).

On June 6, 1955, by s. 1 of the Requisitioned Houses and Housing (Amendment) Act, 1955, the right to possession of a requisitioned house occupied by the licensee of the Minister of Housing and Local Government vested in the local authority. On Jan. 28, 1956, the local authority gave notice to the owner of the house, in accordance with s. 4 (1) of the Act, inviting him to accept the licensee as a statutory tenant. The owner accepted the invitation in the statutory form dated Mar. 23, 1956. The rent was paid weekly and the local authority's right to possession terminated on Apr. 2, 1956, on which date the licensee became statutory tenant of the owner. Compensation, under s. 4 (2) (c), to the owner for loss of his right to vacant possession on release of the house from requisition was paid by the local authority on May 2, 1956. The local authority contended that the Minister's contribution should be at the rate of one hundred per cent. under s. 10 (1) (a) as the compensation was a payment which fell to be made in the period ending with Mar. 31, 1956. The Minister contended that the contribution should be at the rate of seventy-five per cent. under s. 10 (1) (b) as the payment fell to be made at a date after Mar. 31, 1956.

HELD: the compensation to the owner became payable when the invitation was accepted on Mar. 23, 1956, and was a payment within s. 10 (1) (a), under which the local authority was entitled to receive contribution from the Minister at the rate of one hundred per cent.

ADJOURNED SUMMONS.

This was an application by East Ham Corporation for the determination of the question whether, on the true construction of s. 10 of the Requisitioned Houses and Housing (Amendment) Act, 1955, and having regard to the acceptance by an owner of premises on Mar. 23, 1956, of an invitation under s. 4 of the Act to accord to a licensee the status of statutory tenant and to the payment by the corporation to him of compensation under s. 4 (2) (c), the corporation were entitled to receive contribution from the Ministry of Housing and Local Government, who were defendants to the summons, at the rate of one hundred per cent. under s. 10 (1) (a).

J. W. Mills for the plaintiffs, the local authority.

Denys B. Buckley for the defendants, the Ministry of Housing and Local Government.

DANCKWERTS, J.: This is an application for the construction of the provisions of the Requisitioned Houses and Housing (Amendment) Act, 1955, under which, in certain events, compensation will be payable to the owner of a house which has been requisitioned. Compensation has to be paid by the local authority, who become entitled to certain payments from the Minister of Housing and Local Government.

The Act of 1955, which came into force on June 6 of that year, was intended to bring to an end the requisitioning of houses, and return, subject to certain conditions, those houses to the owner. Section 1 (1) provides:

" On the commencement of this Act, any power of the Minister to retain possession of requisitioned houses shall be terminated, and the right to possession of every such house shall vest in the appropriate local authority."

The effect of that provision is to take the houses which have been requisitioned away from the Minister, who had the right to requisition them—and to transfer the requisitioned houses, or the right to them, to the local authority. Section 1 (2) provides the date on which requisitioning is intended to come to an end:

" Subject to the provisions of this Part of this Act, the local authority in whom the right to possession of a requisitioned house is vested under this section may retain possession of the house until Mar. 31, 1960, and no longer."

There is, thus, a definite date on which the requisitioning is to come to an end.

Section 4, which is one of the material sections that I have to consider for the purposes of this application, is a provision intended to provide for the conversion of the position of a licensee, holding a house purely by virtue of the requisitioning, to that of a statutory tenant. Section 4 (1) is as follows:

" Any local authority may, subject to such directions, if any, as may be given by the Minister, and shall, if so required by the Minister, serve on the owners of such requisitioned dwellings as may be decided by the authority or specified by the Minister, as the case may be (being dwellings of which possession is retained under this Act) a notice inviting those owners to accord to the licensees of the dwellings the status of statutory tenants in consideration of payments to be made by the local authority in accordance with this section by way of compensation for loss of the right to vacant possession on the release of the dwellings."

That provides for the offer. Subsection (2) provides for the effect of acceptance by the owner. It reads:

" If within the period specified in that behalf in any such notice of invitation the owner gives to the local authority notice of acceptance in such form as may be so specified, then—"

The word " then " plainly means " thereupon ". Certain consequences are to follow. These are set out in the following three paragraphs of sub-s. (2):

" (a) the right of the local authority to retain possession of the dwelling under this Act shall be terminated at the expiration of a period of one week beginning with the day on which the next instalment of rent is payable by the licensee under the licence by virtue of which he occupies the dwelling;

" (b) as from the expiration of that period, the Rent Acts shall apply to the dwelling as if the licensee had retained possession by virtue of those Acts after the expiration of a tenancy at a rent equal to the standard rent specified in subsection (3) of this section, upon the terms that the landlord undertook to pay the rates and to provide such services (if any) as were provided for the licensee as such (whether by the local authority or by the owner in pursuance of arrangements with the local authority) and otherwise upon the terms and conditions as the said license; and

" (c) the local authority shall pay to the owner compensation at such rate as may be specified in the notice of invitation, being a rate determined by the Minister with the consent of the Treasury (such compensation to be calculated by reference to the aggregate of the rental compensation payable in respect of the dwelling for the year ending with the date on which the notice of

invitation was given, to the nature of the interest of the owner in the dwelling and, in such cases as may be so determined, to the character of the dwelling)."

Section 10 is really the section on which the present question arises. That provides for contributions to the expenses of the local authority by the Minister in certain events. Subsection (1) provides:

"The Minister shall pay to every local authority in respect of any deficit incurred by that authority (as assessed by the Minister) in connexion with all requisitioned houses of which they are for the time being in possession under this Act, and in respect of any payments falling to be made by that authority under s. 4 of this Act, a contribution at the following rate, that is to say—(a) one hundred per cent. in respect of any such deficit incurred and payments falling to be made in the period ending with Mar. 31, 1956; (b) seventy-five per cent. in respect of any such deficit incurred and payments falling to be made in the years ending with Mar. 31, 1957 to 1960 inclusive."

It is on that provision that the question which I have to determine turns. It is claimed, in the present case, that the payment falls within para. (a) and not within para. (b), so that the contribution by the Minister is one hundred per cent. and not merely seventy-five per cent. The material words which have to be applied are "payments falling to be made in the period ending with Mar. 31, 1956".

I now turn to the facts of the case. The house concerned is 49, Rixsen Road, Manor Park, E.12. On Jan. 28, 1956, a notice was sent to the owner by the local authority inviting him to accept the licensee as a statutory tenant according to the provisions of the Act. The first paragraph of the notice is:

"In accordance with s. 4 of the Requisitioned Houses and Housing (Amendment) Act, 1955, the East Ham County Borough Council hereby invite you to accord to Clifford Henry Pursall, the licensee of the above-mentioned dwelling, the status of statutory tenant in consideration of the payment to you by them (in addition to any terminal compensation to which you may be entitled under s. 2 (1) (b) of the Compensation (Defence) Act, 1939) of a sum equal to five times the amount of the rental compensation payable to you in respect of the dwelling, being the rate of compensation which the Minister of Housing and Local Government, with the consent of the Treasury, has determined as being the appropriate rate having regard to the nature of your interest in the dwelling."

That rate had been previously determined by the Minister, and therefore it was merely a case of the application of the rate already fixed by the Minister in the case of this particular house. I am informed that terminal compensation under the Act of 1939 is in the nature of dilapidations.

Then para. 2 states what would happen if the invitation were accepted:

"If, within three months from the date of this notice, you accept the invitation in the form set out attached, the dwelling will be released at the expiration of one week from the next day on which rent is payable by the licensee to the council. The rent day is Monday of each week."

The rent was payable weekly. That offer was accepted by the owner in the statutory form of acceptance. It was dated Mar. 23, 1956. The acceptance, therefore, plainly was before Mar. 31, 1956; but the date on which the occupation by the local authority came to an end was Apr. 2, 1956, and the compensation was eventually paid on May 2, 1956.

It was contended on behalf of the local authority that the date when payment by way of compensation became payable was the date of the acceptance, namely,

Mar. 23, 1956. It was contended on behalf of the Minister that the date was when the local authority went out of possession of the requisitioned house and the licensee under the requisitioning became a statutory tenant, so that he could not be turned out by the owner as his landlord, and the right to vacant possession thereupon determined.

It is a question which is not at all easy to answer. There are certain things to be said in favour of the argument on behalf of the Minister. It has been pointed out that if before the date when the local authority gave up possession under the Act of 1955 the licensee either died or went out of his own accord the right to vacant possession would never be lost by the owner, as the statutory tenancy would not have come into operation in that case and that therefore, if the owner received payment before that date, he would have been paid for something to which he had never in fact had to submit. I have, however, to see what the Act says and to construe the phrase " payments falling to be made " before a certain date.

Section 4 (2) of the Act of 1955 defines what is to happen as the result of the acceptance of the local authority's invitation. It is to be noticed that para. (a) is a paragraph which defines the date when the local authority is to give up possession. A definite date is mentioned, that is to say a date which is necessarily later than the date of the acceptance, and will depend on the date when the payment of rent is payable by the licensee. The licensee does not become a tenant until he becomes a statutory tenant on the date which is fixed by this paragraph in the Act, and that is a definite date which is ascertainable with regard to the terms of his licence from the local authority. It might well take place at a considerable time after the date when the invitation was accepted. If the local authority had licensed the individual to occupy on terms which made his rent payable only yearly (which, perhaps, would be unlikely), or at quarterly or at six-monthly intervals, obviously the right to occupy under the licence and the possession of the local authority might continue for a number of weeks after the date when the invitation by the local authority had been accepted by the owner.

In the present case it was in fact only a little more than a week, because it was an occupation under which a rent was payable weekly by the licensee. The same date is named in s. 4 (2) (b) as the expiration of the period of the local authority's possession under the provisions of para. (a) after which the tenant becomes a statutory tenant. On the other hand when in regard to the provision providing for compensation under para. (c) no date is named at all: there is simply a provision that compensation at a certain rate is to be paid by the local authority. It has been contended by counsel for the plaintiffs that that shows that the ordinary rule should apply and that on the date when the offer is accepted the compensation becomes due and payable.

Counsel for the defendants argued that that was by no means conclusive because the very nature of compensation is a payment to be made for a loss which has been suffered by the person to be compensated; and in a case where there is a postponement of the acceptance as regards the determination of the occupation by the local authority the loss might never be suffered if the licensee went out before determination of the period; and he pointed to the concluding words of s. 4 (1) " by way of compensation for loss of the right to vacant possession on the release of the dwellings ". But I think counsel for the plaintiffs was right when he said that counsel for the defendants was trying to give a twist to the sentence and a variation in the position of the words contained in that final provision in s. 4 (1).

It seems to me that, under that provision, the compensation is for the loss of the right to vacant possession on the release of the dwelling. By his acceptance

of the invitation of the local authority the owner loses the right to vacant possession on release of the dwelling. He parts with the right when he accepts the invitation. If that is so everything that the owner is required to do has been done, and it seems to me that thereupon he is entitled to compensation for the right which he has given up.

It is perfectly true that if the licensee goes out of occupation before the date of the determination of the local authority's right to possession, the owner would then never become subject to a statutory tenancy, and it might be said that he had been paid compensation for which he had given no consideration. It is not necessary for me to determine now whether that is so or not. The owner has in fact given up his right, though, if the normal process of conversion of the licence into a statutory tenancy does not occur, the right which the owner has given up may turn out to be less valuable than it would otherwise have been.

In my view, therefore, the transaction so far as the owner was concerned was complete on Mar. 23, 1956, and the compensation became legally payable at that date. Whether it was paid or not immediately seems to me to be immaterial.

Accordingly my decision must be in favour of the local authority.

Judgment for the plaintiffs.

Solicitors: *Sharpe, Pritchard & Co.*; *Solicitor, Ministry of Housing and Local Government.*

R.D.H.O.

QUEEN'S BENCH DIVISION

(Lord Parker, C.J., Ashworth and Hinchcliffe, JJ.)

October 7, 1959

SALES-MATIC, LTD. *v.* HINCHLIFFE

Gaming—Lottery—Information laid under Betting and Lotteries Act, 1934 (24 *and* 25 *Geo.* 6, *c.* 58), *s.* 21—*Declaratory section—No offence created.*

Section 21 of the Betting and Lotteries Act, 1934, which provides: "Subject to the provisions of this Part of this Act, all lotteries are unlawful", is merely a declaratory section and does not create any substantive offence. An information, therefore, charging a defendant with unlawfully conducting a lottery by means of a certain machine contrary to s. 21 of the Act of 1934 is bad in law.

Case Stated by justices for the city of Bradford.

On Oct. 1, 1958, two informations were preferred by the respondent, a police inspector, against the appellants, charging them with unlawfully conducting a lottery by means of a bubble gum machine, contrary to s. 21 of the Betting and Lotteries Act, 1934, between July 18 and Aug. 3, 1958, outside the shop, 192, Manchester Road, Bradford, in one case, and between May 20 and May 24, 1958, outside the shop, 11, Otley Road, Bradford, in the other case. On the hearing of the information at Bradford Magistrates' Court on Jan. 30, 1959, the following facts were found. The appellants installed and maintained in position outside each of the shop premises, between the relevant dates, a coin-operated automatic vending machine, which was filled with coloured balls of chewing gum and a quantity of trinkets or charms of plastic material. The number of trinkets or charms in the machine was appreciably less than the number of balls of chewing

gum. The intrinsic value of a trinket or charm was trivial, but was an inducement to children to purchase the chewing gum. The machine was operated by the insertion therein of one penny, in return for which the customer received either one ball of chewing gum or one ball of chewing gum plus a trinket or charm. It was a matter of pure chance whether the customer received a trinket as well as a ball of chewing gum. Members of the public had full and free access to the machine and used it between the relevant dates. It was contended by the appellants that s. 21 of the Act of 1934 did not create a substantive offence, but was merely declaratory of the law.

The justices were of the opinion that the appellants had been properly charged under that section. They convicted the appellants and imposed a fine of £10, with costs, in respect of each of the offences. The appellants appealed.

J. R. Phillips for the appellants.

G. Baker for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the City of Bradford, before whom informations were preferred by the respondent, a police inspector, against the appellants that on certain days outside certain shop premises at Bradford they

> " did unlawfully conduct a lottery by means of a certain machine, namely, a bubble gum machine, contrary to s. 21 of the Betting and Lotteries Act, 1934."

The magistrates found the offences proved and imposed a fine of £10 with five guineas costs in respect of each of the two offences. The machine, in each case, was apparently situated on the pavement outside the shop, and it contained a number of balls of chewing gum for which a child desiring to purchase one put a coin in the slot. Attached to some of the chewing gum balls were trinkets or charms which had an additional attraction for children. When one put a penny into the slot, it was pure chance whether one got just a ball of gum or a ball of gum and a trinket.

The only question that arises here is whether the appellants, the company which had these machines, were properly charged with an offence. As I have said, they were charged with an offence contrary to s. 21. Section 21, which is the opening section of Part 2 of the Act dealing with lotteries and prize competitions, is very short and is to this effect:

> " Subject to the provisions of this Part of this Act, all lotteries are unlawful."

The sole question is: Do those words, as the magistrates have held, create an offence?

Section 21 is followed by s. 22, which sets out a number of offences in connexion with lotteries. Section 22 (1) is in this form:

> " Subject to the provisions of this section, every person who in connexion with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere . . ."

Then follows a number of things such as printing tickets, selling tickets, using premises, causing or procuring certain matters; and s. 22 (1) provides that in all those cases the doer shall be guilty of an offence. The penalties are laid down by s. 30, which provides that a person guilty of an offence under any section contained in Part 2 shall be liable on summary conviction and on indictment as there set out.

For my part, I find it unnecessary to refer to any other provisions of the Act, save to say that by s. 23 and s. 24 certain lotteries, which otherwise would be unlawful by reason of the general statement in s. 21, are said to be not unlawful if certain conditions are fulfilled. Each of those sections goes on to provide that, if the conditions are not fulfilled, then the person concerned in the promotion shall be guilty of an offence.

Going back to s. 21, it is, in general terms, declaring all lotteries to be unlawful. It is, to my mind, a novel way of declaring something to be an offence. One may test it in this way: Always supposing that the intention was to create an offence or offences by those words, what are they? Is it saying that anybody who conducts a lottery or promotes a lottery is guilty of an offence? Is it saying that anybody who partakes in a lottery is guilty of an offence? It seems to me that the proper construction of the section is that it is a declaration that all lotteries are unlawful, and then, owing to the difficulty of saying what is meant by promoting or conducting or being concerned with a lottery, the legislature goes on, by s. 22, to declare a number of matters, which are connected with the promotion and form part of the promotion and conducting of a lottery, to be offences. Whether if the appellants had been charged under s. 22 they could have been held guilty, I do not know. I suspect that in the normal way the appellants would have been charged under s. 22 (1) (f) in that they used premises for purposes connected with the promotion or conduct of a lottery, but that whoever was considering the matter thought that it was difficult to say that part of a pavement outside a shop was premises, and, therefore, fell back then on the general provisions of s. 21. In my opinion, s. 21 does not create an offence, and, accordingly, this appeal succeeds.

ASHWORTH, J.: I agree.

HINCHCLIFFE, J.: I also agree.

LORD PARKER, C.J.: The case must go back to the magistrates with an intimation that s. 21 creates no substantive offence and that the appellants were not properly convicted.

Appeal allowed.

Solicitors: *Ward, Bowie & Co.*, for *James A. Lee & Priestley*, Bradford; *Wilkinson, Howlett & Moorhouse*, for *Town Clerk*, Bradford.

T.R.F.B.

[END OF VOLUME 123.]

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